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No. 3807

1308

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FREDERICK H. GREIME,

Libellant and Appellant,

VS.

Steam Vessel "DAISY", etc., S. S. FREEMAN,

Claimant and Appellee.

BRIEF FOR APPELLANT.

H. W. HUTTON,

Proctor for Appellant.

FILED

FEB 15 1922

F. D. MONCKTON,
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No. 3807

IN THE

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VS.

Steam Vessel "DAISY", etc., S. S. FREEMAN,

Claimant and Appellee.

BRIEF FOR APPELLANT.

Statement of Facts.

During the month of April, 1920, appellant, who was an able seaman on the steam vessel "Daisy", was struck on the left temple and seriously and permanently injured by a hook that was attached to the end of a wire winch fall, while he was receiving and stowing lumber in the hold of that vessel as she was lying alongside of a wharf at Knappton in the State of Washington.

The direct cause of his injuries were that the vessel left San Francisco, where libelant shipped and the vessel was owned, with the wire falls on

the vessel too short for the work of loading lumber on her and that necessitated the operation of her winches in a manner contrary to the way they had been designed and constructed to be operated.

The facts are the vessel had two winches one forward and one aft. On each was a shaft that was operated by the steam engine of the winch. At about the center of its length was a friction wheel and on each side of the friction wheel a drum loose upon the shaft. When it was sought to cause one of the drums to revolve the winch driver, who stood at the winch with a lever that controlled the throwing in of one of the drums one in each hand, pulled on that lever and it would throw the drum up on the friction and the engine would cause the drum to revolve. When it was sought to release the drum he slackened on the lever and it was supposed to automatically release itself from the friction; but the testimony is, *that the drum did not always do so.*

Around each drum was a wire fall, each of which ran through a block at the foot of one of the masts of the vessel, and, stepped into the foot of each mast, were two booms that led upward and outward so as to form a "V". Each fall ran up one of the booms, then through a block at the outer end of each boom and then were brought down and together, and hooked into a contrivance made up of a chain, a penant and a hook, that was called the "blacksmith's shop". In loading, the upper end of one boom would be set out a little over the vessel's side, and the other over the offshore rail of the vessel, the

outer end of which would be a little higher than the inshore boom; the upper and outer ends of the booms when so set being about 50 feet or more apart.

In loading the vessel, the winch driver would cause the inshore drum to revolve and allow the offshore drum to run loose and thus pull the "blacksmith's shop", over the wharf. It would then be hooked on to a load of lumber and he would hoist it off the wharf with the inshore drum. When so hoisted, he would hold its weight with the inshore drum and then cause the offshore drum to revolve and swing the load of lumber out over the vessel, and lower it with both drums down where it was desired to land it, when it would be unhooked and the operation repeated until the vessel was loaded. The winches were constructed to be operated with both ends of the wire falls attached to the "blacksmith's shop" that is alleged in paragraph III of the amended libel (Trans. pg. 6), and is admitted in the answer. It is alleged in the libel also that the winch could not be safely used any other way. The safety matter is denied in the answer. We will take that up later.

When first commencing to load, the lumber would be right alongside of the vessel. As it was worked into the vessel, however, it would be necessary when they took that, to take what was piled up further out to drag it over the wharf, the vessel having to take up to what was 60 feet away from her side.

On the day in question they commenced work at 8 A. M. and worked up to about 11.45 A. M. at which time the lumber had been taken away from

the side of the vessel to such a distance, that the offshore fall was too short to do the work and it was found necessary to unhook it, drag the inshore fall out to the load, hook that on to the load, then drag it into the side of the vessel, attach the offshore fall and so proceed in landing the load on the vessel.

It appears in the testimony that that method of loading lumber had been used by all vessels on the Pacific Coast for years. When the offshore fall was so disengaged, it would be attached to a pile, if there was any pile near enough; if not one of the stevedores would hold the rope in his hand while the process of hauling the load over the wharf by the inshore fall was going on, and it frequently happened that the offshore drum would revolve and pull it out of his hands. That is what happened in this instance, why no one seems to know, and the hook at the end of the fall flew down and struck appellant, inflicting the injuries mentioned.

Of course if the end of the offshore fall had remained attached to the "blacksmith's shop" appellant would not have been injured. The question in this case then is, Why was it detached? The only testimony in the case, that is testimony, on what caused them to detach that fall, *is that the fall was too short.*

It appears that they have had a habit of fixing the lengths of the wire falls on a winch, without any regard to what the winch had to do, but arbitrarily making them three times the length of the vessel's boom; thus a vessel with a 40-foot boom would have

falls 120 feet in length, a vessel with a 70-foot boom would have one 210 feet in length. This vessel with a 56-foot boom was supposed to have one 168 feet in length. There is no *legal* evidence in the case though as to what its length actually was. Whatever its length was, however, it was too short. The vessel was sent up to get a load of lumber; the shipowner furnished the appliances; those on the vessel were compelled to use what appliances were furnished and in the absence of any testimony in the case, the presumption is that they did the best they could with what were so furnished by the owner.

Some of the evidence was taken by deposition, and some by the court. The lower court did not see all the witnesses. There is, however, little or no conflict in the evidence; if there was, the rule of this court that, where the lower court has seen the witnesses and there is a conflict, this court will not disturb the findings of the lower court, does not apply.

The matter as to the falls being too short came in by amendment after the testimony of Paul Frank the winch driver, was taken on behalf of the claimant. Appellant was down in the hold of the vessel when struck; was unconscious for about three hours; when he recovered consciousness he was in a hospital and never knew what was the real cause of his being struck until Frank's deposition was taken. He knew that the winch was being used contrary to the way it was designed to be used, but did not know why it was being so used. The winch driver first gave him correct information and he amended to suit the proofs.

Argument.

I.

Appellant relies upon all of his assignment of errors, herein and submits to the court that the finding of the lower court:

“The injury to libelant however much it is to be regretted, was not caused by any faulty equipment, but by the careless use of the equipment with which the vessel was supplied”,

is contrary to all of the evidence in the case; that if there was any carelessness on the part of those on board of the vessel, which we have been unable to find any evidence of, that carelessness was directly caused by the previous negligence of the owner of the vessel in furnishing improper equipment, to wit: falls that were too short, and if such is the fact, the owner's negligence contributed to the injury and he is liable.

The duty of the owner of a vessel is laid down in the case of *The Osceola*, 189 U. S. 159, and afterwards repeated in *Chelentis v. the Luckenbach S. S.*, 247 U. S. 381, and is:

“That the vessel and her owners are both by English and American laws liable to an indemnity, for injuries received by seamen in consequence of the unseaworthiness of the ship, *or a failure to supply and keep in order, the proper appliances appurtenant to the ship.* *Scarff v. Metcalf*, 107 N. Y. 211.”

It will be observed that the language is, “supply *and keep in order*”. There is a duty to supply in the first instance, and a *continuing duty to keep in order*.

The rule was laid down in the *Osceola* case prior to the state compensation laws, and we have no doubt the court had its own language in the case of *Hough v. R. R. Co.*, 100 U. S. 213, reading:

“Its duty in that respect to its employees is discharged when, *but only when*, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally *as in keeping and maintaining them in such condition* as to be reasonably and adequately safe for use by employees”.

in mind when it laid down the rule in the *Osceola* and *Chelentis* cases, as the rule is identical with what is laid down in the above *Hough* case.

When it was finally determined that state compensation laws did not apply on board vessels, it left the law just exactly where it was before such compensation laws were adopted, and no ground can be found for the ruling of some courts, that the responsibility of the owner ends with the furnishing of a seaworthy vessel at the commencement of the voyage. *The duty is a continuing one*, and the language on the duty of the owner is exactly the same in the *Chelentis* case decided in 1918 as it was in the *Osceola* case decided in 1903. We will now take up what happened in this case: The rope was disconnected to enable those on board to load the vessel, three times the length of the boom, without any regard to what the actual requirements were, had developed a custom on the Pacific Coast to unhook the offshore fall. The proof is that that frequently led to the fall being pulled out of the hands of those

who held it, that the loose drum frequently revolved and the man had to let go.

We respectfully submit that it was the duty of the owner to know what was going on on the vessel. They knew the lumber had to be hauled up to 60 feet over the wharf, and it was their duty to see by measurement that a fall sufficiently long was supplied. The following is the only evidence in the case on whether the fall was long enough or not. Claimant's witness Frank, page 67, by deposition:

“Q. Just describe the manner of using the ships gear?

A. The ship's gear, the ship's gear has to be disconnected, the falls, for to reach the last pile.

Q. Why?

A. Why, because it is impossible, it is customary in steam schooners since many and many a year, and simply has to be done, to reach the last pile, so that the falls get disconnected and are connected again by means of a little pennant.

Q. You say that you had to disconnect them in order to reach the last pile; just why is it, why don't you leave both falls connected together when you are taking lumber from the dock? A. It won't reach.

Q. It won't reach?

A. The lumber, no, because one fall is too short.

Q. The off-shore fall is too short? A. Yes.

Q. Is it any shorter than the in-shore fall?

A. No, it is the same length, but the off-shore boom is setting out.

Q. Who directed that the falls be disconnected at the time of the accident?

A. The mate.

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Q. Is it customary or not to use the method employed on the Daisy?

A. It is a necessity.

Q. Well, is it customary or not among lumber schooners plying up and down the coast?

A. Yes surely; we have to."

Carl Johan Carlson, master of the Daisy, by deposition:

"Q. After you had straightened the fall out and pulled in a load of lumber to the edge of the wharf with the in-shore fall, would you hook onto the off-shore fall then when you swung it over the ship?

A. There are no other means of getting the lumber aboard the ship except to hook on the off-shore fall, as soon as the load is to the edge of the dock."

By the testimony of Christian Evanson, master of steam schooners, called by claimant and testifying in court; the falls in this case were shorter than the ordinary fall, he testified in part:

"Q. What is the *ordinary* length of a steam schooner falls, do you know?

A. From 200 to 235 feet.

* * * * *

Q. With a 210 foot wall, has it been customary, or not, in taking lumber from up the dock, to disconnect the falls? A. Yes.

* * * * *

Q. Have you ever used this method of disconnecting falls at the time you do up the dock to get lumber? A. If it is necessary, yes.

Q. When is it necessary? Why do you use it?

A. When you cannot reach it without your off-shore fall.

Cross-Examination.

Q. If the off-shore fall was longer; it would reach, would it not? A. Sure it would.

Q. It would not have to be any longer, than the distance that the outer ends of the booms are apart, would it? A. That is right.

Q. That is correct? A. Yes.

Q. Have you ever seen a stevedore placed to hold that hook in his hand? A. Yes.

Q. And he frequently lets go don't he?

A. I have seen them let go, yes.

Q. Would it be impracticable to put on sufficient cable to reach up the dock the ordinary distance that you find the lumber so that you could leave both falls connected together, and go up the dock and pick up this lumber and bring it to the ship side?

A. It could be done all right, but it is not practicable in one way, you got so much wire on the drum and it is harder to pull the two falls back on the dock.

Q. You mean harder for the man?

A. Harder for the man to drag the hook along with the two falls.

Q. Would it have any effect on the cable itself?

A. I don't know, not unless they got so much on the drum it would chew up the cable.

Q. Would it have any effect upon the ability of the winch-man to operate the winch?

A. No, I do not think so."

Of course if the vessel had her other side to the wharf, the offshore fall would be the present inshore fall. What was required was falls that, no matter which side of the vessel lay to the wharf, the offshore fall would be long enough to reach without unhooking it.

There was a failure to supply a proper appliance in this case. The only thing that appears in the

case on the part of claimant is the testimony of one of the claimants, S. S. Freeman. What he testified to was that the booms were 56 feet in length, and the falls 180 feet in length (Trans. pg. 56). Just how he could testify to that fact, does not appear, for after so testifying on direct examination on page 56, on cross-examination, page 58, he says he never measured the falls and did not even know where they were bought. He supposed at Foard Barstow however. We respectfully submit that that is not evidence. Again he is apparently a shipowner. It does not appear that he ever went on board a vessel and operated her; it does not appear that he had ever been a seafaring man; he knew nothing according to his own evidence of the custom that prevailed of detaching the offshore fall on account of its not being long enough; he was not on the ground when appellant was injured, still he expresses an opinion that the falls were long enough. That is only an opinion—the opinion of a man based upon nothing, and is entitled to no weight as against the evidence of the winch driver who was on the ground, and the fact that it appeared in evidence that the rule that Mr. Freeman followed of three times the length of the boom, caused about every ship that loaded lumber to detach the offshore fall. They seem to have had to do so or be unable to load the vessel.

It is certain that if the three to one rule had provided an adequate length, that would not have been necessary. Mr. Freeman says he knew nothing about such a practice. The fact that he knew nothing about the practice, when every one was doing it,

shows his incompetence as a seafaring man and his lack of knowledge of what was required.

His testimony given in court in so far as it relates to the length of the falls is as follows:

“and the booms on that boat are 56 feet long; the falls are 180 feet. All the cargo is supposed to be delivered within 60 feet of the vessel’s tackle in sheltered ports, and those falls are plenty long enough for that.”

* * * * * *

Cross-Examination.

“Q. Have you ever measured the falls on the ‘Daisy’ yourself? A. I have not.

Q. You left that to the captain and the mate, did you not?

A. No, we order those through the office, we order them from a ship chandler, and they are measured by the ship chandler.

Q. It is the office then, that regulates the length of the wire; is that right?

A. Just what they order; those are the falls that they always have been using on these boats.

Q. The captain sent in and told you how long to make them?

A. The captain does, yes, he puts in a requisition.”

That shows Freeman knew nothing of his own knowledge as to how long the falls were; but if they were 180 feet, they were shorter than an ordinary fall, as the testimony is that an ordinary fall is from 200 to 235 feet long.

The duty of the shipowner is shown in the following cases: First, it is their duty to use ordinary care, and the fact that others were doing the same thing is no test as to whether ordinary care is being used:

Wabash R. R. Co. v. McDaniels, 107 U. S. 454, where the selection of an employee was involved, but the Supreme Court says, the test as to instrumentalities was the same.

“A degree of care ordinarily exercised in such matters *may not be due*, or reasonable or proper care, and therefore not ordinary care within the meaning of the law.”

Texas & P. R. Co. v. Behymer, 189 U. S. 468:

“What is usually done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence whether it is usually complied with or not.”

Can it be reasonable prudence to have kept sending vessels to sea with a fall three times the length of the boom, as on the evidence in this case?

Nyback v. Champagne Lumber Co., 48 C. C. A. 632:

“Common sense and reason do not lose their sway because, through ignorance, inattention or selfishness, unreasonable custom may have prevailed.”

Both ignorance and inattention on the part of Mr. Freeman is shown by his testimony.

Redfield v. Oakland C. Ry. Co., 112 Cal. 220, 224:

“Custom may originate in motives of economy, or the stress of pecuniary affairs, or in recklessness, and not from considerations based upon proper discharge of their duty towards others using their cars.”

Labatt on Master & Servant, Section 947:

“It is submitted, there is no sufficient basis upon which to found an inference of law that an employer fulfills his duty when he adopts instrumentalities and methods in common use.”

And that is all we have in this case.

Burton v. Greig, 265 Fed. 418:

“I am satisfied that it is the duty of the ship and of her owners, not only to furnish a seaworthy ship and appurtenances at the beginning of the voyage, but to keep both the ship and her appurtenances in this condition. (Rule in Osceola case then quoted.)

Now, while the court here used the expression ‘keep in order’ in reference to the appliances appurtenant to the ship, it seems to me the same rule must necessarily be applied to the ship as to the appurtenances. While this is true, I do not consider that either the ship or her owners are insurers of the ship and her appliances.”

Berg v. Philadelphia & R. Co., 266 Fed. 891:

“The failure to supply a proper eubolt and to keep it in order brings the case under the rule of the Osceola, and renders the vessel and owner *liable to indemnity for injuries, and not for mere care and cure.*”

Corrado v. Pederson, 249 Fed. 165,

decided by his Honor Judge Dooling, we think in square conflict with the decision in this case.

The Dredge No. 13, 264 Fed. 135:

“The law applicable is well settled, namely, that the employer did not fulfil the duty imposed upon it by merely furnishing a reason-

ably safe place in which to work, and suitable appliances such as would have been provided by persons of ordinary prudence engaged in like business under similar circumstances and conditions, but owed the further duty to maintain the same, *which involved the duty of reasonable inspection*, to the end that the boiler would be kept in reasonably safe condition and for injuries arising from failure in this respect is liable."

(Page 177.) "The duty of inspection imposed upon the owners was a *non-assignable duty*, which would not be fulfilled by merely appointing some one for that purpose. It was incumbent upon the respondent to show that it had discharged its duty in that respect, and that the person appointed discharged his duty. The obligation is a positive one, and of a continuous character, the service to be seasonably performed; and for injuries arising from failure in these respects the respondent is liable." (Citing many cases.)

The duty devolved on someone in this case to see what the results of the appliances as furnished were. If it devolved on Mr. Freeman, there is no evidence that he performed it; if it devolved on the master of the vessel, he was the representative of the owners for that purpose, and his negligence was their negligence. The master knew how the winch was being used for he so testified.

Section 20 of the Seaman Act as it then stood removes the master and all the officers at that time from the position of fellow servants. See the

Baron Napier, 249 Fed. 126.

Cricket S. S. Co., 263 Fed. 523:

In that case the vessel was held liable because a winch fall was made of wire rope that, it was held, was too stiff. We can see no distinction between a wire rope that was too stiff and one that was too short. Those on the ship used it, however.

Storgard v. France, etc., 263 Fed. 545:

“If the bolt was worn and defective, and the shipowner knew of it *or ought to have known the fact*. It makes no difference whether they as reasonable men would not have appreciated the particular accident which actually did happen. The evidence was that the sailors always used this ring on their way to the topmast. *The seamen were bound to use the equipment and appliances which the owner furnished*, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which might have been known. It is intimate and peculiar, and differs from that between master and servant, who may at any time withdraw from service and refuse to use tools and appliances which they think dangerous. Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of these servants.”

We respectfully submit that, under the test of any one of the above authorities, the decree herein should have been for the libellant.

II.

If the court's decision herein was based upon the use of the article in question, the ship is still liable.

The law is clear upon that, if there was original negligence of the employer, contributing negligence of a fellow servant will not relieve the employer from liability.

Patton-Tully Transf. Co. v. Turner, 269 Fed.
344, 339.

Kreigh v. Westinghouse & Co., 214 U. S. 249, 257:

“If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work.” (Cases cited.)

That decision lays down in other than the above quoted part a complete statement of the respective duties of the employer and employee, together with the latter's rights.

Globe S. S. Co., 245 Fed. 54.

III.

A seaman does not assume the risk of defective appliances.

The Colusa, 249 Fed. 21;

The Fullerton, 167 id. 1.

IV.

It does not appear in this case what caused the longshoreman to let go the line. It is in evidence

that men similarly situated frequently had to let go of them. We must assume that it was dragged out of his hands. The fault arose, however, in furnishing an appliance that had to be used in that way.

V.

The furnishing of the short fall forced those on board to disconnect the ends of the wire falls.

Someone on that vessel represented the owner. It will not do to say that an owner can send a vessel to sea and be free from responsibility for all future happenings. The detaching of the falls made the appliances unsafe, otherwise appellant would not have been injured. We will cite the following, which is the law on that subject:

Labatt on Master and Servant, Section 923:

“If new functions are imposed upon an instrumentality by the master himself or his representative, and the servant is thereby exposed to undue risks, the master must answer for any injury resulting from those risks, and cannot excuse himself by showing that the instrumentality was a suitable one for the performance of the work for which it was originally supplied. The master’s acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose.”

We hardly think it can be the law that Mr. Freeman and all the other shipowners on the Pacific

Coast can lay back and allow what the evidence shows as going on in the use of their three times the length of the boom falls, and escape responsibility; put the master and seamen in a position of either using defective appliances or bring back an empty ship, with attendant discharge, and be held blameless. Nor do we think there is any decision of the Supreme Court of the United States that holds that the liability of the owner ends when the vessel starts on her voyage. We know of none. On the contrary, all the decisions we can find hold the other way.

If such were the law, no seaman could ever recover. It is on the voyage, not in the home port, that a seaman is usually injured. He usually joins the vessel just as she is about to leave port, and we are certain that the Supreme Court never intended that the rule laid down in the *Osceola* case should be so construed as to relieve a shipowner from all responsibility for what happened after the vessel left port. His duty to keep the appliances in order contemplates a continuing liability and responsibility that does not end with the departure of the vessel from port. In the *Chelentis* case, which seems to be the foundation of the theory, the man was injured by a heavy sea, which, of course, was no one's fault. But in this case the vessel did not leave port in a proper condition. The evidence is uncontradicted that the falls were too short. Mr. Freeman's opinion is based upon the three times the length of the boom practice, and all the evidence is that all ves-

sels with falls so computed have to adopt the same method as was adopted in this case. If Mr. Freeman had offered any testimony from actual knowledge, the fact all vessels on the coast did the same as the Daisy did, would be a complete refutation of his opinion that the falls were long enough.

We respectfully submit that the following part of the finding of the lower court,

“The injury to libelant, however much it is to be regretted, *was not caused by any faulty equipment*”,

is against all the evidence, as an equipment must be faulty that leads to and compels the disarrangement of a steam winch to enable the work to be done; and again, an appliance must be faulty when it is furnished not by regard to the work it has to do, but on account of an arbitrary practice, in which fitness is not taken into account.

We respectfully submit, also, that the following finding of the lower court is against all the evidence, to wit:

“but by the careless use of the equipment with which the vessel was supplied.”

The finding itself comprehends that the equipment could have been used in a more careful manner, or in another manner. There is nothing in the record tending to show that it could have been used in any other manner, or a safer manner. On the contrary, all the testimony is that all vessels with winch falls on a three times the length of the boom basis were compelled to operate the winch the same as it was

operated on the Daisy. If claimant had shown some other way the winch could have been operated there might be some basis for that finding, something to speculate on, at least; but there is nothing in this record upon which such a finding can be predicated.

It is true that some mention is made of fastening the hook to a spike; but it was the short fall, the fault of the owner that would occasion such fastening, and the evidence is not clear that that would have remedied matters, as sometimes the friction does not work. Testimony of Henry A. Larson:

“Q. Now, when one drum is thrown in on the friction and the other is not thrown in, is there any liability of that other drum revolving in those winches? A. Yes.

Q. What would make it revolve?

A. A little grease in the friction there, or a little dirt, or if they have been heaving a heavy load, it naturally forms in that wood a sort of groove in there; the drum is liable to stock, when they throw up on the lever, that drum might not be thrown off this friction, without the winch driver knowing it, and sometime he, not knowing it, it will turn over.

Q. Do they do that frequently?

A. Yes. I have seen it jam so hard that you will have to take a block of wood and knock the drum out, to leave her release; that happens frequently.”

It seems that special care should be taken to have a fall long enough under such circumstances. One of the witnesses said that if the fall was fastened to a spike, the spike would have to be a strong one.

The evidence as to the distance they were dragging the lumber across the wharf is all found in the testimony of Frank, the winch driver. Appellant did not know; he was down in the hold. If they were dragging over the 60 feet it was within the power of claimant to prove it. The fact that they did not prove that to be a fact shows they could not prove it. The only positive testimony Frank gave on that subject was as follows:

“Q. At any rate, you were only pulling the stuff, the lumber or piles, whatever it was you were moving, from thirty to fifty feet away from the edge of the wharf, and pulling them over to the edge? A. Yes.”

On redirect examination he showed some doubts as to his knowledge. On that point the above was a positive answer, however; but if they were exceeding the 60 foot limit at the time it would have been easy for claimant to have proven it. The fact that they did not do so shows any testimony they may have had on that point would have been adverse.

We respectfully submit that for the foregoing reasons the decree of the lower court herein should be reversed.

Dated, San Francisco,
February 11, 1922.

H. W. HUTTON,
Proctor for Appellant.

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BRIEF FOR APPELLEE.

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MCCUTCHEM, OLNEY, WILLARD, MANNON & GREENE,

Proctors for Appellee.

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No. 3807

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FREDERICK H. GREIME,	}
<i>Libelant and Appellant,</i>	
VS.	
Steam Vessel "DAISY", etc., S. S. "FREEMAN",	
<i>Claimant and Appellee.</i>	}

BRIEF FOR APPELLEE.

Statement of Facts.

The accident occurred in April, 1920,* on board the steam schooner "Daisy". The vessel was taking aboard a cargo of lumber at Knappton, Washington. Appellant was working in the hold. The owners and operators were residents of San Francisco and were not with the ship at the time of the accident. The schooner was under the exclusive control of her officers. Stevedores in the

* So that section 33 of the Merchant Marine Act of 1920 effective June 5, 1920 (41 Stat. L. 1007) and purporting to create a liability in damages against shipowners for injuries sustained by negligence as distinguished from those resulting from unseaworthiness or defective equipment, is inapplicable.

employ of the ship, under the sole direction of the mate, assisted in the loading.

The equipment of the vessel may be described as follows: The booms—two 56-foot round timbers—were footed to the ship's mast near its base: the upper end of one (called the inshore boom) extended over the dock, and that of the other (called the offshore boom) was plumbed over the ship's offshore rail. Near the base of the mast was the winch. This, on the "Daisy" was of the friction type. It consisted of the driving cog wheel cast upon the middle point of a shaft, with a spool on either side, riding loosely on the same shaft; the friction, made of wood, cut in the shape of a truncated cone—secured fast to the sides of the cog wheel with the smaller end pointed towards the near spool; and levers to throw the spools in against the friction. The cogwheel was geared directly to a steam-driven shaft. On pressing the steam foot pedal, the wheel and the friction cone revolved, but the spools revolved only when in against the friction. Each spool was operated by its own lever. Around one was wound the wire cable known as the offshore fall and around the other that called the inshore fall. Each fall ran from its spool through pulley blocks along and to the upper end of the corresponding boom, thence to the common cargo hook to which it was fastened. The cogwheel and friction always turned together in the same direction. The spools (hereafter referred to as the drums) turned either direction. When a load was to be lifted, the drum to be used was thrown against the friction and revolved with it and as the drum revolved, the respective fall was wound around it.

When a load was to be lowered, the drum was thrown off friction and turned the opposite direction by the weight of the load—the fall in this instance “paying off” from the drum. It follows that one or each drum might be unwinding its fall while, at the same time, the cogwheel and friction might be turning directly opposite.

When the vessel moored at the lumber company's dock, the lumber to be taken was made up in several piles, some close to the edge of the dock and others at various distances further back. In loading, the lumber was first taken from the piles nearest the ship and when this had been removed, the next were taken and so on until a full cargo had been obtained. In the course of the work it was found that some of the piles furthest back from the ship were too far away to be picked up with the ends of the falls connected. To meet this condition, the falls were separated at the cargo hook (that is to say, at the chain contrivance holding the cargo hook, which is spoken of as “The Blacksmith Shop” or “bridle”) and while the end of the fall leading from the offshore boom was held by a stevedore on the dock, the end of the fall leading from the inshore boom was taken up the dock to the load. The load was then dragged over the dock with the inshore fall and when brought to the proper distance from the ship, the two falls were again connected and the load was taken aboard as originally when the lumber was close by.

The testimony is that when, in practice, the inshore fall is being used separately as above described, the

manner of tending the end of the offshore fall has been various, according to the circumstances or to the whim of the mate who happens to be in charge. If a pile is convenient, a rope strap is thrown around it and the end of the fall is hooked into it, or a heavy spike is driven into the dock or as here a stevedore takes hold of the hook. Captain Evanson said on this subject (Ap. 54):

“A spike or ring bolt or anything you want to, and tie your strap in on some lumber pile; there are several things that can be done.

Q. That is up to the Captain? A. Yes.

Q. It would be perfectly safe if he had a strap hooked on there, would it? A. Yes.”

The accident occurred while a load was being hauled over to the ship's side with the inshore fall. Due either to the thoughtlessness of the winchman in throwing into friction the drum to which the offshore fall was attached, or to the inattentiveness of the stevedore holding the end of the offshore fall, it (the end of the offshore fall) left the stevedore's hand, swung across the rail of the ship and down into the hold, striking Mr. Greime, who, as we have said, was working there.

In appellant's description is a constant recurrence of the statement that the falls were too short. This, when referring to the offshore fall, conveys the impression that that cable was shorter than the one for the inshore fall. The suggestion is incorrect. Both falls were the same length. The reason the offshore fall would not reach up the dock as far as the inshore fall was that its boom extended away from the dock while

the inshore boom extended over the dock towards the place where the lumber was. The expression could not apply to the inshore fall because it actually reached the lumber. It is merely a use of words but we think the fairer description is to say that the lumber was placed too far away from the ship for the falls to be used together.

Again, appellant says that when one drum was being used separately, the idle one would frequently revolve. The testimony of winchman Frank, upon which appellant rests his point, is as follows (Ap. 68-69, cross-examination):

“Q. When the shaft turns the drum is liable to revolve, isn’t it?

A. *Not an empty drum*—well, the drum what is engaged, what is thrown into friction, will revolve.
* * * * *

Q. Supposing the shaft is revolving and you throw one drum on the friction and you leave the other loose, won’t the friction of the shaft cause the loose drum to turn?

A. *If it is a good winch, it never will.*

Q. Sometimes they turn a little, don’t they?

A. Sometimes they do.

Q. Even where they are not thrown up on the friction they will?

A. Yes; I have seen many frictions, friction winches doing that.”

It is obvious from this testimony that it is only in the case of a winch out of order that the idle drum will revolve when not engaged with its friction. The positive statement of the witness was that “If it is a good winch it never will.” This is supported by common sense. The drum floats idly upon an oiled shaft. It is

inconceivable that, in proper working order, it could exert any substantial pull against the weight of the 125 odd feet of $\frac{5}{8}$ " wire cable hanging down from the head of the boom. This also against the friction of the blocks through which the fall runs.

Appellant says that claimant's answer admits the winches were constructed to be operated with the ends of the falls connected to each other (App. Brief, 3). The point may not be material, but we think such loose statements misleading. The allegation of the libel is

"The said steam winch was designed and constructed to be so operated." (Ap. 6.)

The answer alleges:

"Admits that said steam winch was designed and constructed to be substantially operated as in said paragraph alleged, but denies that it was designed or constructed to be operated only in said described manner." (Ap. 15.)

If this be the unqualified admission appellant suggests, it can only lend support to the view that the ship-owners had no intention of using the ship's equipment in the manner in which it was used, and as we will later point out, are not responsible for the use in a manner other than that for which furnished.

Points and Authorities.

"Except for failure to render proper medical treatment, neither a vessel nor her owner is liable to an indemnity for injuries received by a seaman, unless they were caused by the unseaworthiness of a ship or a failure to supply and keep in order the proper appliances appurtenant."

Such is the unquestioned rule of liability and the doctrine of

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372,
as announced by this court in the recent case of

The Frank D. Stout, 276 Fed. 382.

That proper medical treatment was afforded is conceded. It only remains to determine the shipowner's status under the two remaining elements of the rule.

**I. THERE WAS NO UNSEAWORTHINESS NOR FAILURE TO
SUPPLY AND KEEP IN ORDER THE PROPER APPLIANCES
APPURTENANT.**

(a) The authorities.

The owners of a vessel are not, as to a seaman, insurers of her seaworthiness. Their duty is to use reasonable care.

Referring to this obligation in

Schirm v. Dene Steam Shipping Co., 222 Fed.
587, 589,

the court said:

“it is expressed in terms of reasonable care, the care that a reasonably prudent person would take under the circumstances.”

See also,

The C. S. Holmes, 220 Fed. 273 (9th C. C. A.);
Burton v. Greig, 265 Fed. 418.

Unless palpably unreasonable or clearly dangerous, custom among shipowners is the measure for determining what is reasonable care

Boston Marine Ins. Co. v. Metropolitan Redwood L. Co., 197 Fed. 703, 711 (9th C. C. A.):

“The question of the unseaworthiness of a vessel on account of her equipment is largely determined by custom and usage”

The Lizzie Frank, 31 Fed. 477, 478:

“The owner of this vessel was required to use and exercise in its construction and equipment the usual and customary means and care adopted by reasonably prudent persons in the construction and equipment of vessels of like character.”

The Rheola, 19 Fed. 926, 927:

“Due care or ordinary care implies the use of such vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience.”

Hunt v. Hurd, 98 Fed. 683, 686 (7th C. C. A.):

“Because the business might be done in some other and slower way, less dangerous, it does not follow that the method employed involves negligence. The real question is whether the method is the one in general use by other railroad companies, and is reasonably safe. If it is, then it is not negligence of itself, and without regard to circumstances, to employ that method.”

Canadian Northern Ry. Co. v. Walker, 172 Fed. 346, 352:

“when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars and of removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor clearly dangerous, it owes its servants no duty to adopt a different method, and it cannot be held guilty of negligence because it has not done so.”

The shipowner is not bound to furnish the best and safest appliances.

In re Tonawanda Iron & Steel Co., 234 Fed. 198, 200:

“Tow chocks of the kind on the *Oceanica* were common in ships of her class and construction, and indeed towing chocks allowing good play of line were regarded as convenient and proper appliances; but, even if such were not the case, no negligence for failure to provide more modern appliances is attributable to the vessel, as it has often been decided that owners are not obliged to provide the best, safest and most convenient appliances.”

See also,

The Santa Clara, 206 Fed. 179;

Saversnick v. Schwarzchild & Salzberger, 125 S. W. 1192;

Great Western Sugar Co. v. Pray, 158 Fed. 756.

- (b) The “*Daisy’s*” falls were long enough, without being disconnected, to reach any loads placed within the customary distance.

Without conflict, the evidence is that ship’s falls are usually about three times the length of the boom (Ap. 47, 51). And this is not an arbitrary length fixed without reason, as appellant would have the court believe. Experience has proved that that amount of cable allows for the run up the boom and a balance for reaching into the various corners of the hold and up the dock for the ordinary purposes of the vessel (Ap. 47, 62).

In view of this rule the shipowners provide in their charters that cargo shall be delivered within reach of ship’s tackle and in the particular vessel may specify

the distance. This was what was done with the "Daisy." Her booms, according to Mr. Freeman, were 56 ft. long, her falls 180 ft., cargo was to be delivered within 60 ft. of her side and within this distance she could take it easily without disconnecting the falls (Ap. 56, 57, 58).

Appellant protests that Mr. Freeman's testimony that the falls of the "Daisy" were 180 feet long is not legal evidence because he had not actually measured the falls. But the record is replete with testimony that the falls of steam schooners are customarily three times the length of the boom; the length of the boom on the "Daisy" was 55 feet (as her master testified Ap. 93); and the winchdriver testified that the reach of the "Daisy's" falls was not any different than that on any other vessel he had been on. (Ap. 78) Certainly appellant, as libellant below, did not show the falls to be shorter than customary and usual and if he claimed unseaworthiness or defect of equipment in this behalf, it was his business (his burden of proof) to make the showing. He did not make it.

Be that as it may, however, the lumber which was being taken aboard at the time of the accident was more than 60 feet distant from the vessel's side.

Appellant, making a contention that the distance was only thirty to fifty feet, misrepresents the testimony of Frank, the winchman, by quoting a mere fraction of it. The entire testimony on this subject was as follows (all on cross-examination by proctor for appellant):

"Q. How far was the pile or the lumber that you were hauling over to the edge of the wharf, away from the edge of the wharf, about how far?

A. About—well, I don't remember exactly. It all depends on the length of the lumber. If it was

about 30 ft., 30 ft. in one of the piles or in several of the piles, they ought to be at least 150 feet away from the ship." (Ap. 72, 73.)

After this quotation and answer the examining proctor turned to other matters and then came back to the question of the distance of the lumber from the ship as follows, obviously putting into the witness's mouth as distance of the lumber from the ship, the figures which the witness previously used as lengths of lumber to calculate that distance (Ap. 74):

"Q. At any rate, you were only pulling the stuff, the lumber or piles whatever it was, you were moving, from 30 or 50 feet away from the edge of the wharf, and pulling them over to the edge?

A. Yes.

Q. How many feet do you think it was?

A. That is another question I cannot—it might have been but from 75 up to 100 to 150 ft. away.

Q. Away from the edge of the wharf?

A. Yes."

Appellant's brief quotes only the following question and answer culled from the foregoing and consisting of a leading question, framed by a misrepresentation of what the witness had previously said in that it propounds as *distance from the ship* what the witness had given as *length of timbers*.

"Q. At any rate, you were only pulling the stuff, the lumber or piles, whatever it was you were moving, from thirty to fifty feet away from the edge of the wharf, and pulling them over the edge?

A. Yes." (Appellant's Brief, p. 22.)

The court will note how the witness corrected the foregoing immediately he appreciated that he was being misled. "That is another question" etc. he said when he

realized he was being interrogated as to the distance of the lumber from the ship which he says was from 75 up to 100 to 150 feet.

Appellant's counsel refers to this as doubts on redirect examination (App. Brief, p. 22). This was not redirect but continued cross-examination.

We know the court will not countenance this kind of misleading presentation of testimony. The falls were ample for taking lumber within 60 ft. of the ship's side and the reason the mate disconnected them was not that they were too short, but that the mill company placed a portion of the cargo too far away—further away than the charter called for and beyond the point where the shipowners intended the falls should work. The vessel was not a new one. She had always been able to handle cargo within the 60 ft. distance before (Mr. Freeman, Ap. 57, 58). And if on the previous voyages made by appellant the falls were not disconnected as he would have us understand (Mr. Grieme, Ap. 36), he must admit them to have been sufficient for lumber delivered within the customary distance.

But even granting for the sake of argument that the falls were not long enough to take aboard the ordinary cargo without being disconnected in the later stages of the work, nevertheless,

- (c) **In any event the provision of falls which might have to be disconnected to reach loads was not a provision of defective or unfit appliances. A system of disconnecting falls is safe if properly operated.**

Appellant's argument, as we understand it, is that the falls, separated, could not be used safely and the ship-

owners, knowing, that to reach the lumber away from the edge of the dock, they would have to be so used, were negligent in not providing longer falls.

Assuming for the purposes herein, that the lumber was placed within the customary distance—and there is, as we have shown, no evidence that such was the case—the use of the falls, disconnected, was perfectly safe, if properly done.

First: Appellant says such use was unsafe because even with the offshore drum away from its friction, the traction of the moving shaft on the drum would cause it to revolve. This is contrary to the evidence and also to sound reason. The winchman said,

“If it is a good winch, it never will.” (Ap. 68, 69.)

Appellant's own witness, Larson (Ap. 46), said that to make the idle drum revolve there would have to be

“a little grease in the friction there, or little dirt, or if they had been heaving a heavy load, it naturally forms in that wood a sort of a groove in there; the drum then is liable to stick, when they throw up on the lever, that drum might not be thrown off its friction, without the winchdriver knowing it, and some times he, not knowing it, it will turn over”.

Sometimes, he says,

“I have seen it jam so hard that you will have to take a block of wood and knock the drum out, to leave her release; that happens frequently”.

It is evident that the occurrences which he was describing were when the winch was not in good working condition and when the drum was not free of its fric-

tion. Here the testimony shows the winch in good working order (Ap. 77). According to Mr. Larson the conditions described are the only ones under which the idle drum will revolve. If he had meant otherwise, he would have said so. It follows that the drum free and but riding on the shaft, would not turn and without turning, the hook could not be pulled out of the stevedore's hand.

Assuming that the turning of the shaft would give a slight pull on the fall, there could not possibly be sufficient traction to operate against the weight of the fall (p. 6, *supra*), and at most the pull would not be so great that the stevedore could not hold the hook.

Second: If there was sufficient traction for the idle drum to revolve and pull the hook out of the stevedore's hand, another method of securing the hook should have been used. The other means described were, the use of a rope strap on a pile or on a pile of lumber, or the use of a spike. Thus on cross-examination by proctor for appellant, Captain Evanson testified:

“Q. Now, what would there be to stop him” (the stevedore put to hold the hook and a fellow servant of appellant) “from driving an eyebolt, or something else in the wharf, to hook onto that?”

A. Nothing in the world to stop him.” (Ap. p. 52.)

And again (at page 54 of the Apostles) the same witness testified answering questioning begun by the court and continued by counsel:

“Q. What would be the objection to having one of these with hooks instead of having a sailor hold it?”

A. I don't know. Sometimes I have seen both. Sometimes we have got a man there, and other times we have not a man there.

Q. They do not have a man there, and they hook it on? A. Yes.

Mr. MACKEY. Q. When they do hook it on something, what do they use?

A. A spike or ring bolt, or anything you want to, and tie your strap in on some lumber pile; there are several things that can be done.

Q. That is up to the captain? A. Yes.

Q. It would be perfectly safe if he had a strap hooked on there, would it? A. Yes."

If the method actually used (of having a stevedore hold the hook) was improper, it was negligence for which the shipowner is not answerable.

The Frank D. Stout, supra.

Third: The foregoing is conclusive that unless the drum was engaged with its friction, the hook could not have been pulled out of the stevedore's hand or if this were apt to take place, other means were available to obviate the risk. But appellant suggests that the pull on the fall was or might have been due to the sticking of the drum on the friction without the winchman's knowledge. Under some circumstances this might be so, but even then it would be the result of the winchman's negligence. It was a part of his work as the operator of the machine to see that the drum was free when necessary. As the facts are, however, the drum could not possibly have remained bound to its friction. If contact was made it must have been due to the intentional or inadvertent operation of the winch levers. Thus: On the last load lowered into the hold, both

drums must have been free from friction as the load went down. The drums were unwinding. When the empty hook was pulled back out of the hold, both drums must have been engaged in friction;—the drums were winding up their falls. But to allow the hook to pass over the dock to the point where the falls were disconnected, the offshore drum would have to “pay out” its cable, while the inshore drum wound its cable up. For the inshore drum to do its part, it must have turned with the friction, as in lifting a load, but to “pay out” as the ^{off}inshore drum was required to do, it would have to revolve in the opposite direction. That the hook was drawn out to the dock is conclusive as to freedom of the offshore drum from its friction. Hence, whether the drums might on some occasions stick in friction is beside the point and immaterial.

II. THE REARRANGEMENT OF THE SHIP'S EQUIPMENT WAS, IF WRONGFUL, A MISUSE OF APPLIANCES FURNISHED AND NOT A FAILURE TO KEEP IN ORDER THE PROPER APPLIANCES.

Appellant seeks to hold the shipowners responsible for the alleged misuse of the ship's equipment under their obligation to “keep in order the proper appliances appurtenant”. In anxiety and confusion he says “Someone on that vessel represented the owner”. He fails to appreciate the significance of the terms “delegable” and “non-delegable” duties. With respect to the obligation to supply and keep in order the proper appliances, he is right when he says “someone on that

vessel represented the owner". That obligation is non-delegable. But in the *operation* of the appliances, no one represented the owners in a way to make them or their ship answerable. The late section 20 of the Seaman's Act upon which appellant still seems to pin some faith, furnishes no argument. It is simply "irrelevant".

Chelentis v. Luckenbach S. S. Co., *supra*.

It may be that if the detaching of the falls were an act in the performance of a non-delegable duty and it were found negligent and wrongful, the shipowner would be liable. This irrespective of section 20 of the Seaman's Act. The statute makes it no stronger. But, to appellant's misfortune, if it were negligence, it was in the performance of one of those duties which are said to be delegable and for which the shipowner is not answerable. It makes no difference who did it, master, mate or seaman. It was an act of operation. It was a detail in the use of appliances which the shipowner is permitted to leave to his crew. The principle is the same as that recently enunciated by this court in

The Frank D. Stout, *supra*,

decided last October.

"If it was careless not to use a trip line, such carelessness is attributable to the officers of the ship, but not to the owners, who supplied ropes."

There it was non-use of appliances furnished. Here, if wrongful, a misuse of them.

So also, in

John A. Roebling's Sons Co. v. Erickson, 261 Fed.
986, 987, 988 (certiorari denied, 40 Sup. Ct. 394;
64 L. Ed. 480):

“So far as the unusual and dangerous method of discharging the cargo is concerned that was an improvident order of the master, for which the owners are not liable (*Chelentis v. Luckenbach S. S. Co.*, supra);

* * * * *

There would, however, be little security for careful owners if, after furnishing a seaworthy ship and proper appliances, they were still liable for the act of the master in not using the proper appliances furnished, or in using them for purposes for which they were not furnished.”

See, also,

The Persian Monarch, 55 Fed. 333 (2nd C. C. A.);
26 Cyc. 1120;

American Bridge Co. v. Seeds, 144 Fed. 605 (8th
C. C. A.).

The phrase “keep in order” means no more than that reasonable care must be exercised to keep the ship seaworthy. It refers to structural defects or weakness, the result of wear and tear in use. Due care must be used to see that cables, ropes, spars, appliances and rigging are of suitable materials, quality and kind, and to see that they are kept in that condition, but the phrase does not mean that the shipowner must see that the parts are used properly nor that when the movable equipment is to be adjusted for work that he must see that it is placed properly. For non-use or misuse by the crew the shipowner is not answerable and if there

was any wrong in the way the "Daisy's" appliances were used, it was "misuse" within this rule. Proper appliances were supplied. Nothing was defective or worn out.

III. THE STEVEDORE ON THE DOCK WAS LIBELANT'S FELLOW-SERVANT.

All engaged in loading the "Daisy" at the time of the accident were in the employ of the ship and under the sole direction and supervision of the mate (Ap. 89).

If therefore appellant's injuries were due to negligence of the *stevedore* (as distinguished from that of an officer and member of the crew of the vessel) who was supposed to hold on to the hook, it was negligence of a fellow-servant for which the shipowners are not answerable.

Herman v. Port Blakely Mill Co., 71 Fed. 853;
Harrell v. Atlas Portland Cement Co., 250 Fed.
 83;
The Hoquiam, 253 Fed. 627 (9th C. C. A.);
Western Fuel Co. v. Garcia, 260 Fed. 839 (9th
 C. C. A.).

IV. APPELLANT ASSUMED THE RISK OF AN ACCIDENT SUCH AS OCCURRED.

The general doctrine of assumption of risk is well stated in

Bethlehem Iron Co. v. Weiss, 100 Fed. 45, 49:

"a servant, upon entering the service of his master, assumes all the ordinary risks incident to

the service, so far as those risks at the time of entering upon the service are known to him, or should be readily discernible to a person of his age and capacity, in the exercise of ordinary care, and whether the business is dangerous or not."

This doctrine, as regards to the ordinary risks incident to the employment is applicable to seamen.

The Iroquois, 194 U. S. 240; 48 L. Ed. 955:

"A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of a seaman."

In this situation, if it be admitted for the sake of argument, that because of the prevailing custom on this coast, the method in loading the "Daisy" was one adopted by the shipowner, *that same custom makes the risks incident to the method employed, one of the usual risks of the employment which were assumed by the appellant*. He cannot blow hot and cold, and with the same breath that he puts knowledge of the custom on the shipowners, escape the imputation to himself. In fact, his opportunity for knowing the custom was greater than that of the shipowners because he was always present during the progress of the work, while it is unlikely that the shipowners were present.

In this respect the following cases seem to us conclusive:

Red River Line v. Cheatham, 60 Fed. 517, 521 (5th C. C. A.):

"The general usage in the business being proved, and being known to all steamboat hands and em-

ployes, it follows that the risk attendant upon such method of landing steamboats is incidental to the employment, and assumed by the employe.”

(N. B.: Employe was a deck hand.)

The Saratoga, 94 Fed. 221, 223 (2nd C. C. A.):

“but so far as the crew, and the regular gangs of workmen from shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situation and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they were thus advised, they took their risk.”

In the same case in the District Court, 87 Fed. 349, 359, it is said:

“It must be concluded that the libelant assumed the risk of danger arising from the known fact that it was the custom to leave hatches uncovered.”

Hunt v. Kile, 98 Fed. 49, 53:

“If, as claimed, Davis was an experienced man, and accustomed to such work, it cannot be asserted that he was ignorant of the danger resulting from the omission to supply or employ them. Under such circumstances, he entered upon the particular work knowing that chocks were not furnished, and with full knowledge of the danger which might result from their absence. He therefore assumed the risk, and the master cannot be held responsible for failure of duty in this respect.”

Hughes v. The W. & St. P. R. Co., 6 N. W. 553 (Minn.):

“But if a man enters and continues in a service with knowledge of the manner in which the business is conducted, without objection to his employer, or any promise on the part of his employer to change the mode of doing business, he does it with

his eyes open, assumes the risks, and cannot recover damages, even although this mode of conducting business be careless."

Benedict v. Chicago Great Western Ry. Co., 78 S. W. 60, 61:

"An act which is performed in the usual manner in practice for the doing of such acts is presumed in law to be reasonably safe, and a servant injured while in the service of the master on such occasions is held to have assumed the risk, and the master is not liable to the servant for his damages."

See also,

The Scandinavia, 156 Fed. 403;

Herman v. Port Blakely Mill Co., 71 Fed. 853.

The Colusa and *The Fullerton* have been cited as authority for a doctrine contrary to that announced above. They and others that might be mentioned are distinguishable, however, in that they involve the assumption of the *risk of a defective appliance*, and not of a *customary method*. The risk of a defect in an appliance is necessarily isolated, and never one of the usual or customary risks of an occupation. In the present case, if the knowledge imputed by custom is to prevail, libellant knew or should have known when he shipped on the "Daisy" that he would be subjected to the risks incident to the method used.

V. THE BURDEN OF PROVING UNSEAWORTHINESS IS ON APPELLANT AND THIS HAS NOT BEEN MET.

"The fact of accident carries with it no presumption of negligence on the part of the employer; and

it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence",

said the United States Supreme Court in

Patton v. Texas and P. R. Co., 179 U. S. 658,

and continuing, it said:

"it is not sufficient for the employee to show that the employer *may* have been guilty of negligence; the evidence must point to the fact that he *was*.

And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." (Italics ours.)

Examining the evidence it is obvious that *the proof does not show*,

(a) That the falls were too short. It merely shows that in the particular instance the lumber was placed too far away.

(b) That the idle drum of the winch would revolve even when not engaged in friction. It merely shows that it might revolve if the winch be out of order. There is no evidence that this winch was *out* of order. On the contrary there is evidence that it was *in* order.

(c) That the idle drum, disengaged from friction, did in fact, revolve at the time of the accident.

(d) Or even that the accident was proximately due to the arrangement of the equipment. According to the

evidence, the accident might have been caused by any one of the following: Inadvertent pulling of the wrong lever by the winchman, pure carelessness of the stevedore in not maintaining a firm grip on the hook or—granting appellant's contention—to a turning of the drum on the shaft. But at best it might have been due to one as much as the other. That the drum stuck to the friction must be eliminated, because as we have shown, it must have been turning opposite to the cog-wheel, when it was pulled out on the dock (p. 16, *supra*).

**VI. ALL WITNESSES EXCEPT TWO OF CLAIMANTS WERE
HEARD IN OPEN COURT AND THE FINDINGS OF FACT MADE
BY THE TRIAL COURT SHOULD NOT BE DISTURBED ON
APPEAL.**

It is true that there is no conflict in the evidence as to the manner in which the accident occurred but whether or not the vessel was seaworthy and properly equipped and what the appliances would do under various arrangements, was contested. That, under such circumstances where the trial court has heard practically all the testimony, its findings will not be disturbed, except for manifest error, is, of course, settled in this circuit as elsewhere.

The Hardy, 229 Fed. 985;

The Beaver, 253 Fed. 312.

The lower court's findings were:

“The injury to libelant, however much it is to be regretted, was not caused by any faulty equipment, but by the careless use of the equipment with which the vessel was supplied.”

VII. APPELLANT'S AUTHORITIES ARE NOT IN POINT.

The citations in appellant's brief on the duty of the shipowner “to keep in order” the proper appliances all have to do with structural defects, not method of use or arrangement. Thus:

Burton v. Greig, 265 Fed. 418,
involved an alleged defective steam pipe.

In

Berg v. Philadelphia & R. Co., 266 Fed. 591,
there was an improper or defective eyebolt.

In

The Dredge No. 15, 264 Fed. 135,
there was a defective (leaky) boiler.

In

Cricket S. S. Co., 263 Fed. 523,
an improperly constructed winch fall was supplied
and no others were available.

On the question of assumption of risk, as previously said appellant's authorities are easily distinguishable from the case in hand. In both *The Colusa* and *The Fullerton*, the seaman injured was at sea with no alternative but to work with the appliances at hand. Here

the vessel was in port and appellant could have quit the ship. Moreover, in the cases referred to, the appliances were defective. Here, if the use was wrongful, it was a method of work with which appellant was much more familiar than the shipowners. If he did not approve, it was his privilege to enter other employment.

So also as to the authorities on custom and usage as determining the measure of care required of an employer.

In

Wabash R. R. Co. v. McDaniels, 107 U. S. 454, the court was concerned with the contention that compliance with ordinary practice conclusively established the use of reasonable care. This is not what we urge. Our assertion is that in the absence of a showing that common usage is palpably unreasonable or manifestly dangerous, reasonable care has been exercised when the methods and equipment generally used by others in a similar business have been employed. This disposes of appellant's other citations on this point.

For the foregoing reasons we submit that the decision of the lower court should be affirmed with costs in favor of appellee.

Dated, San Francisco,

February 24, 1922.

Respectfully submitted,

FARNHAM P. GRIFFITHS,

MCCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,

Proctors for Appellee.

No. 3807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FREDERICK H. GREIME,

Libelant and Appellant,

VS.

Steam Vessel "DAISY", etc.,

S. S. "FREEMAN",

Claimant and Appellee.

APPELLANT'S REVIEW OF APPELLEE'S BRIEF.

H. W. HUTTON,

Proctor for Appellant.

FILED

MAR 7 - 1912

F. D. MONTGOMERY



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Steam Vessel "DAISY", etc.,

S. S. "FREEMAN",

Claimant and Appellee.

APPELLANT'S REVIEW OF APPELLEE'S BRIEF.

On page 4 of appellee's brief we find:

"In appellant's description is a constant recurrence of the statement that the falls were too short."

Either side of the "Daisy" was liable to be at the dock at any time. Which ever side was at the dock, the fall on the offshore side would be too short by the distance between the outer ends of the booms, to-wit: 50 feet, so both falls were too short.

And by the testimony of their own witness, Evan-son, "the falls on the Daisy were shorter than ordinary falls".

There could not be 125 feet of wire cable hanging down from the head of the boom at any time, as mentioned on page 6 of appellee's brief. The so-called evidence of Mr. Freeman is to the effect that the falls were 180 feet long, the boom 56, which would leave 124 feet, from which would have to be deducted the distance from the quarter block at the foot of the boom to the winch and the necessary turns around the drum. It was not shown how much of the fall it would require to meet those requirements.

We submit that the criticism on page 6 of said brief on what we claim the answer admits, as to how the steam winch was designed to be constructed and operated, is a struggle with words, while disregarding substance, as, an admission that the winch was designed to and constructed to be operated *substantially* as mentioned in the complaint, is an admission that it was designed and constructed to be operated that way.

None of the authorities on page 8 of appellee's brief are pertinent to this case. All say that common prudence is the test of the soundness of a custom. An absence of common prudence is shown in this case. The furnishing of falls, that all the evidence shows were inadequate by reason of shortness, that led to a disconnecting of them, when they should have been together, the fact that the evidence shows

they were continually being pulled out of the holder's hands, which meant that at some time or other someone was bound to get hurt, shows lack of common prudence.

On page 9 of said brief we find:

“Without conflict, the evidence is that ship's falls are usually about three times the length of the boom (Ap. 47, 51). And this is not an arbitrary length fixed without reason, as appellant would have the court believe. Experience has proved that that amount of cable allows for the run up the boom and a balance for reaching into various corners of the hold and up the dock for the ordinary purposes of the vessel (Ap. 47, 62).”

The evidence shows exactly to the contrary of the above contentions of the appellee. We quote the following from the testimony of Evanson, an expert called by appellee (Ap. 54):

“The COURT. Q. What relation is there between the boom and the falls that it should be 3 to 1?

A. They figure on a length of 3 to 1, that is, three times the length of the boom, the distance you go up and down, if the boom is 70 feet it will reach down in the hold, or wherever you have to reach.

Q. That is so far as operating on the ship is concerned, if you have to reach away out on shore you need a longer fall?

A. Yes.”

That testimony shows clearly that the 3 to 1 rule was arbitrary as to length, and it also shows that the 3 to 1 rule is only applicable when the work is on the vessel. That if it is desired to do what had

to be done in this case, reach out on shore, the fall is too short and the rule is contrary to ordinary prudence.

The witness further testified (Ap. 51):

“Q. With a 210 foot fall, has it been customary, or not, in taking lumber from up the dock, to disconnect the falls?

A. Yes.”

That shows that the following of such a rule showed lack of ordinary prudence, and the witness was then speaking of a 70 foot boom, the shorter the boom was the worse the vessel would be off.

The 3 to 1 rule, is thus shown, as in no way connected with what the vessel had to do in respect to the hauling of the cargo along the dock.

Further on on page 9 we find:

“In view of this rule the shipowners provide in their charters that cargo shall be delivered within reach of ship’s tackle. * * *”

There is no evidence on that point in the record.

On page 10 we find:

“This was what was done with the “Daisy.” Her booms, according to Mr. Freeman, were 56 ft. long, her falls 180 ft., cargo was to be delivered within 60 ft. of her side and within this distance she could take it easily without disconnecting the falls” (Ap. 56, 57).

Mr. Freeman never mentioned the ship’s side. What he did say (Ap. 56):

“All the cargo is supposed to be delivered within 60 feet of the vessel’s tackle in sheltered ports, and those falls are plenty long enough for that.”

We have already, in our brief, called the court's attention to the fact that what Mr. Freeman testified to was entirely without his knowledge. He may have known something about what the charter party called for as to where the lumber was to be delivered though, assuming that he did, his testimony is to the effect that the lumber was to be delivered 60 feet away from the extreme reach of the falls, not the vessel's side. The owner provided nothing to haul it that 60 feet, although they expected a load of lumber to be brought down on the vessel; they simply provided falls that were adequate inside of the ship's rails and nowhere else.

Texas Pacific Railway Co. v. Callender, 183 U. S. 632, 638.

“It was pointed out by the servants of the railway company and, within the custom of the port of New Orleans it had to be brought within the reach of the ship's tackle before the ship was called upon to take it. The expression, ‘ship's tackle’ means ‘where the ship's ropes can get on to it so that the ship's winches can pull the cotton in.’ ”

Just how Mr. Freeman could testify that the falls were long enough to reach 60 feet beyond their extreme reach he did not state.

We were not required to show that the falls were shorter than customary, as stated on page 10 of appellee's brief. All we were required to show on that branch of the case was that they were of inadequate length, and all the testimony shows that, if appellee could absolve itself by proving a custom, it was for it to do it.

A great deal of pages 10 and 11 of appellee's brief are taken up with excerpts from the testimony of Frank on the supposed distance of the lumber from the edge of the wharf.

Frank's testimony was taken in a watchman's or freight clerk's office on a dock on a Sunday afternoon. The accommodations were limited; all, stenographer included, had to stand up, and counsel for appellant did the best he could. Before going into the distance of the lumber from the wharf the following occurred (Ap. 72) (*italics ours*):

"Q. What, wouldn't they have a bolt or a *pile* to fasten that loose end to instead of having a man standing there holding it by hand?

A. Well there are *piles*; those *piles* there are up to 199 and 200 feet apart from 50 to 200 feet apart. Sometimes you strike a *pile* when convenient, you do not have to travel half a mile, you simply slip a piece of rope over it, and hang the hook onto that pile, but if there is not somebody has to hang on to it.

Q. There must be nothing to prevent driving a spike in or an iron rod or something to hold that loose end?

A. If it is an iron rod or a spike that spike ought to be a heavy spike.

Q. With a man holding it, if the drum happens to revolve it is either going to pull him over the wharf or he has to let go?

A. He has to let go.

Q. Have you ever known of those things being pulled out of a man's hands before?

A. Oh it has happened many a time before."

This vessel was loading lumber from 12 to 30 feet in length. The witness was interrogated about lumber and *piles* all in one question and he evidently

undertook to give an answer on both the lumber and the *piles* he had already testified about. We have no apology to make, even after counsel's criticism, that the following answer is the only answer Frank gave that was positive, and the only one that means anything, to-wit:

“Q. At any rate, you were only pulling the stuff, the lumber or piles, whatever it was you were moving, from thirty to fifty feet away from the edge of the wharf, and pulling them over the edge?

A. Yes.”

A previous question shows he had both lumber and piles in mind when he testified to a greater distance than 30 feet, to-wit:

“Q. How far was the *pile* or the lumber that you were hauling over to the edge of the wharf, away from the edge of the wharf, about how far?

A. About—well, I don't remember exactly. It all depends on the length of the lumber. If it was about 30 ft., 30 ft. in one of the piles, they ought to be at least 150 feet away from the ship.”

Just what that means we do not know, and when he said in another answer “it might have been but from 75 up to 100 to 150 ft. away,” the same answer contemplates that it might not have been more than one foot away. What it might have been, is not what it was.

Referring to paragraph (c) at the foot of page 12 of appellee's brief, we respectfully submit that all of the evidence in this case and common sense

dictates that the winch could not be safely operated when disconnected. Something is said about an eye-bolt being driven into the wharf. It was not shown whether the owners had ever furnished such eye-bolt, spike, or its equivalent. There is nothing to show a pile could have been reached, and all the evidence is that the rope fall was liable to be pulled on, and liable to be let go.

How does counsel know that with the turning of the shaft there "could not possibly be sufficient traction to operate against the weight of the fall" as claimed on page 14 of brief?

But appellee is precluded from raising any question as to the manner in which those on the vessel were operating the winches, as in paragraph III of the answer (Ap. 20) they plead as follows:

"and the manner in which the vessel's winches were to be and were used in said operation which was usual and customary on lumber schooners."

That is supported by the evidence; but if there was negligence on the part of anyone on the vessel, that does not absolve the owner as it was the owner's first negligence that impelled the second negligence. The master of the vessel testified he could not get the lumber on board any other way, and in this respect the case of the Frank D. Stout does not apply as in that case the owners "supplied ropes." In this case they did not supply an adequate, proper rope.

Counsel is continually mentioning negligence on the part of the men on the "Daisy". They first plead and also prove that those men did things according to custom, then claim there was negligence. The claim that the owner is absolved is contrary to all the cases we cited and the following extract from

Globe S. S. Co. 245 Fed. 54,

cited on page 17 of our brief, in which case the learned Court of Appeals of the Sixth Circuit says, on page 60, as follows:

"If the steam was turned on it is fully as likely that the oiler did it, and if the negligence of the ship owner in failing to keep the pump safe and seaworthy, contributed to the injury, the shipowner is liable notwithstanding the concurring negligence of the oiler."...

That is the law and completely answers all of appellee's contention on negligence of a fellow servant. No one, however, knows how this accident happened, except it is known that, if the fall had been long enough, it would not have happened.

As to assumption of risk, appellant was in the hold and knew nothing of what was going on on deck and no one can assume a risk that he knows nothing of.

On the question of how this drum turned, both drums must have turned opposite to the way the shaft turned up to the time the load was hooked onto. It is not, as counsel states, both falls must have been overhauled. As soon as they commenced to haul on the load the inshore drum would commence

to turn with the shaft, and there is nothing to show what caused the other offshore drum to turn if it did turn. However, the winchman was compelled to stand there with two hands and one foot engaged and a slight movement of his body might involuntarily throw the disengaged drum slightly in. What happened we do not know, except that it frequently happened that way, and the following on page 23 of said brief is absolutely unfounded, to-wit:

“(c) That the idle drum, disengaged from friction, did in fact revolve at the time of the accident.”

All the proof we have on that is as follows (Winchman Frank, Ap. 78):

“Q. Well if the drum is not engaged in friction, do you say the fall will be hauled back by the revolving of the shaft of the other drum?

A. It might be possible.

(79) Q. Did it at that time?

A. Well, search me, for it, by golly; I don't know. All of a sudden it happened. That is all I know.

(80) Q. Do you know whether you did at that time, do you remember whether there was any pull on the offshore fall at the time you were hauling that load?

A. No.

Q. Is it possible that you might have given a slight pull on the offshore lever or not?

A. Yes. Really I couldn't tell you how it happened. All I know all of a sudden it happened.”

There is nothing in that testimony on which to base a claim that the drum revolved.

As to the rest of the claims on pages 12 and 13 of said brief, we respectfully submit that they are all, likewise, against the evidence.

Appellee again cannot complain of what was being done on the "Daisy" for another reason, and that is that in paragraph I of their special defense (Ap. 17 and 18) they approve of everything that was being done on the vessel, and claim it was being correctly done.

As to the claim that a spike should have been driven in, we respectfully call the court's attention to the fact that appellee sent the vessel out and claims she was operated in the customary manner. They cannot claim negligence in the following of a custom that they themselves compelled and claim protection under.

Particularly where they used the appliances furnished by the owner of the vessel, in this case, and there is nothing to show that it furnished any other, on the contrary the owner claims they were adequate, when all the proof shows they were not.

Dated, San Francisco,

March 6, 1922.

Respectfully submitted,

H. W. HUTTON,

Proctor for Appellant.

United States
Circuit Court of Appeals⁴
For the Ninth Circuit.

WILLIAM P. HOPKINS and I. A. SHAFFER,
Jr., as Trustees of the Estate of A. C. HOP-
KINS, Deceased,

Appellants,

vs.

EARL C. BRONAUGH, as Trustee in Bankruptcy
of the Estate of MORRIS BROTHERS,
INC., Bankrupts,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Oregon.

FILED
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F. B. HODGSON
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM P. HOPKINS and I. A. SHAFFER,
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Names and Addresses of Attorneys of Record.

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For the Appellants.

JOHN P. WINTER, Title & Trust Building,
Portland, Oregon,

For the Appellee.

Citation on Appeal.

United States of America,

District of Oregon,—ss.

To E. C. Bonaugh, Trustee in Bankruptcy of Morris Bros., Inc., and to John P. Winter, Esq.,
His Attorney, GREETING:

WHEREAS, William P. Hopkins and I. A. Shaffer, Jr., Trustees, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 23d day of November, in the year of our Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Citation on Appeal is hereby accepted in Multnomah County, Oregon, this 23d day of November, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for appellants.

J. P. WINTER,
Attorney for Trustee in Bankruptcy. [1*]

[Endorsed]: No. B—5653. United States District Court, District of Oregon. In the Matter of Morris Brothers, Inc., a Corporation, Bankrupt. Citation on Appeal. U. S. District Court, District of Oregon. Filed Nov. 23, 1921, at ——— o'clock ——— M. G. H. Marsh, Clerk.

In the District Court of the United States for the
District of Oregon.

July Term, 1921.

BE IT REMEMBERED, That on the 19th day of July, 1921, there was received from the Referee in Bankruptcy and duly filed in the District Court

*Page-number appearing at foot of page of original certified Transcript of Record.

of the United States for the District of Oregon, a Certificate of the Referee in Bankruptcy for Review, in words and figures as follows, to wit: [2]

In the District Court of the United States for the
District of Oregon.

No. B-5653—IN BANKRUPT.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Certificate of Referee on Review of Order Dis-
allowing Petition for Reclamation of A. C.
Hopkins Estate.**

To the Honorable District Court Above Named:

The undersigned Referee in Bankruptcy before whom this cause is pending has the honor to certify that on the 14th day of July an order, copy of which is attached to the petition for review herein, was made and entered in the said cause denying the petition of the estate of A. C. Hopkins for reclamation of certain bonds therein described now in the possession of the trustee. Thereupon, on the 16th day of July, 1921, the said petitioner, being aggrieved at the order so made, filed his petition for review, which was allowed.

The issues are fully set up in the petition and the answer thereto, and the findings and conclusions of the undersigned are fully set forth in the order denying the petition, as well as the reasons therefor, so that the question arising upon this record

4 *William P. Hopkins and I. A. Shaffer, Jr.*

is whether or not said order was properly entered.

I transmit with this certificate the petition for reclamation, the answer, and all the exhibits and testimony adduced before me on the hearing of said matter.

Respectfully submitted this 19th day of July, 1921.

A. M. CANNON,
Referee in Bankruptcy.

Notice of the filing of the foregoing certificate mailed July 19, 1921, to J. P. Winter and Marion F. Dolph, attorneys for Trustee of bankrupt, and to C. A. Hart, attorney for claimants.

G. H. MARSH,
Clerk.

Filed July 19, 1921. G. H. Marsh, Clerk. [3]

AND AFTERWARDS, to wit, on the 19th day of July, 1921, there was received from the Referee in Bankruptcy and duly filed in said court a petition of the trustees of the A. C. Hopkins Estate for review of the order of the referee, in words and figures as follows, to wit: [4]

In the District Court of the United States for the
District of Oregon.

No. B-5653.

In the Matter of MORRIS BROTHERS, INC., a
Corporation, Bankrupt.

**Petition for Review of Referee's Order Disallowing
Reclamation Claim of A. C. Hopkins Estate.**

To A. M. Cannon, Esquire, Referee in Bankruptcy:

Your petitioners, William P. Hopkins and I. A. Shaffer, Jr., Trustees of the estate of A. C. Hopkins, respectfully show:

I.

Your petitioners claim to be the owners of the following described municipal bonds, and have heretofore filed in this proceeding their reclamation petition seeking to have an order made turning said property over to them:

Number and Description of Bonds.	Maturity.	Amount.
Nos. 9, 10, and 11 Rigby Independent School District No. 5.	1932	\$3,000.00
Nos. 13, 14, 15, 16, Rigby Independent School District No. 5.	1933	4,000.00
Nos. 17, 18, and 19, Rigby Independent School District No. 5.	1934	3,000.00
Nos. 273 to 278, inclusive, Nos. 280, 256, 257, and 269, Buhl Highway District, Twin Falls county	1935	10,000.00
Nos. 91, 92, 93, 94, and 95, Heyburn-Paul Highway District, Mindoka county	1934	5,000.00
Nos. 11, 12, and 13, Joint School District No. 6, Fremont and Madison counties	1935	3,000.00

6 *William P. Hopkins and I. A. Shaffer, Jr.*

Number and Description of Bonds.	Maturity.	Amount.
Nos. 14, 15, and 16, Joint School District No. 6, Fremont and [5] Madison counties	1936	3,000.00
Nos. 17, 18, and 19, Joint School District No. 6, Fremont and Madison counties	1937	3,000.00
Nos. 20, 21, and 22, Joint School District No. 6, Fremont and Madison counties	1938	3,000.00
Nos. 23, 24, and 25, Joint School District No. 6, Fremont and Madison counties	1939	3,000.00
Nos. 16, 17, and 18, Independent School District No. 1, Bonner County	1932	3,000.00
Nos. 24, 25, and 26, Independent School District No. 1, Bonner county	1933	3,000.00
Nos. 29, 30, 31, and 32, Inde- pendent School District No. 1, Bonner county	1934	4,000.00

II.

On July 14, 1921, an order was made and entered herein disallowing the claim of petitioners to said bonds. A copy of said order is hereto annexed.

III.

Said order was and is erroneous in holding and determining that said bonds are not the property of claimants, and in holding and determining that

the title to said bonds did not pass to claimants prior to the adjudication of bankruptcy herein and in disallowing the claim of claimants to said bonds.

WHEREFORE your petitioners pray that said order may be reviewed as provided in the bankruptcy law of 1898 and by General Order XXVII.

Dated, July 16, 1921.

WILLIAM P. HOPKINS and

I. A. SHAFFER, Jr.,

Trustees of the Estate of A. C. Hopkins.

By CAREY & KERR,

C. A. HART,

Their Attorneys. [6]

State of Oregon,

County of Multnomah,—ss.

I, Charles A. Hart, being first duly sworn, depose and say that I am one of the attorneys for the petitioners described in the foregoing petition. I further depose and say that the statements of fact therein contained are true according to the best of my knowledge, information, and belief.

I further depose and say that I make this verification on behalf of petitioners because neither of said petitioners is within the District of Oregon.

CHARLES A. HART.

Subscribed and sworn to before me this 16th day of July, 1921.

[Seal] ROBERT B. KUYKENDALL,

Notary Public for Oregon.

My commission expires September 1, 1924. [7]

In the District Court of the United States for the
District of Oregon.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Decision and Order on Petition of A. C. Hopkins
Estate for Reclamation.**

The petition under consideration is for the reclamation of \$50,000, par value, of bonds now in the possession of the trustee. The controversy results from the following occurrences:

Before the adjudication and on December 9, 1920, one of claimant's trustees called at the bankrupt's place of business and orally placed an order for the purchase of \$60,000 worth of bonds of various issues and denominations. Some of the bonds selected for purchase by claimant were then owned and in the possession of Morris Brothers, while it merely held re-purchase agreements as to others, the bonds having been pledged in various quarters by the bankrupt, and as to \$10,000 worth of Bay City bonds, these were not then in the possession of Morris Brothers, were not owned by them, and never came into their possession. This block of \$10,000 is not now involved. All of the bonds save the Bay City bonds were subsequently assembled by Morris Brothers and were on hand at the bond house available for delivery on the date of the failure.

On December 10, 1920, the day after the ten-

tative selection of the bonds by the Hopkins' representative, Morris Brothers wrote to the Trustee of the Hopkins Estate, at Lock Haven, Pennsylvania, as follows:

“Mr. William P. Hopkins was in yesterday and subject to your acquiescence on the purchase of said bonds, placed with us an order for the following: (Describing bonds minutely.)

The bonds above mentioned are to be delivered to you about December 23 or 24th, and we are to send the same, via registered mail, insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pennsylvania.” * * * [8]

On December 15, 1920, the trustee thus addressed answered as follows:

“Today we received your letter of December 10th, containing a list of the bonds, arrangements for the purchase of which my co-trustee, Mr. William Hopkins, made with you, subject to the writer's approval.

We have also received the descriptive circulars of the several bonds referred to, together with copies of the attorneys' opinions as to the legality of the various issues.

The writer, basing his conclusion upon the data above referred to, and the fact that Mr. Hopkins went over all these matters in person with your representative, believes the various bonds to be first class and desirable for the investment of trust funds.

You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins."

On December 20, one of the trustees forwarded to Morris Brothers a check for \$61,000, "to apply on a purchase of municipal bonds made from you on December 9th." This check was received and entered on the bankrupt's books as a credit to the Hopkins Estate on account of said purchase.

The record shows that by December 24th the bankrupt had assembled all of the bonds save the Bay City's, had set them aside in an envelope with a rubber band about it, with the name of the Hopkins Estate written across the envelope, all apparently in preparation for delivery to the Hopkins Estate. [9]

This was the condition of affairs when the bond house closed its doors.

The question, and the only question, in my judgment, is, Where was the title to these bonds at the date of the failure? Was it in the Hopkins Estate or was it still in Morris Brothers? To state it the other way round, Was the sale completed, the bonds the property of the Hopkins Estate, Morris Brothers relieved of all risk, and the loss, if there had been one, shifted to the claimant?

The rules of law applicable to this transaction are not different from those that apply in the sale of ordinary chattels or articles of personal property. Delivery of an article from vendor to ven-

dee is a strong indication of intention to pass title. So is payment of the purchase price in full. So also is setting aside and marking of an article with the name of the buyer. But these various acts do not conclusively denote the ultimate intention. Payment in full may be made, but final acceptance and completion of the sale may depend upon inspection or other contingency. In a word, what the courts are concerned with is the true ascertainment of the intention of the parties as reflected by their contract, oral or written, as the case may be, and if this intention cannot otherwise be determined the canon most frequently resorted to is that of determining where the loss would fall in case of fire, theft, or other casualty.

In this case, that which is most strongly urged is that the two acts: Payment in full by the vendee to the vendor and the setting aside by the vendor in its place of business of the property under the name of the vendee, vested the property in the Hopkins Estate and closed the transaction. [10] This can be true only if thereby Morris Brothers fully completed and discharged all its obligations under the contract or was relieved therefrom by waiver on the part of the claimant.

The contract of sale existing between these parties is embodied in the two letters quoted above. There is no other. Hence, it must be ascertained therefrom what Morris Brothers was required to do before the sale was completed and the Hopkins

Estate vested with title to the bonds. This, is my opinion, narrows the whole inquiry to an examination of the question of where it was intended these bonds should be delivered. Was the place Portland, Oregon, or was it Lock Haven, Pennsylvania? If the former, then the petition must be allowed; if the latter, it must be denied.

If, by the contract the property was to be delivered by Morris Brothers at Lock Haven, it is easy to see that neither payment by the claimant before that event happened, nor segregation of the bonds by Morris Brothers at its place of business preparatory to making the delivery, nor the combination of these acts, would shift the title, because the Oregon law enacted in 1919, known as the Uniform Sales Law and embraced in sections 81 and 82 of Olson's Code, controls and it provides:

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

This provision is a statutory enactment of the common [11] law rule determining where the risk lies in case of loss in contracts for the sale of personal property, and the rule is thus well phrased in 24 Am. & Eng. Ency. of Law (2d ed.), page 1050:

“If by the terms of the contract the seller is required to send, or forward, or deliver the goods to the buyer, the title and risk remain in the seller until the transportation is at an end or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer.”

Consequently, if Morris Brothers was required to deliver these chattels to the claimant at Lock Haven, Pennsylvania, the fact that claimant made payment before such delivery no more casts the title and risk upon it than would be the case in the purchase of a bill of common merchandise selected and paid for at a store, where it is agreed the seller shall deliver upon the latter's premises. Under the Oregon statute the title and risk in such case is not with the purchaser, but abides in the seller until he has completed the contract. The statute does not say that if the purchaser has made payment, the seller is relieved of his obligations to deliver, and I am not at liberty to read that into the statute.

If nothing appears to the contrary, the place of sale is ordinarily the place of delivery, but this readily yields to any terms in the contract which modify the rule. The proposal of Morris Brothers to the Hopkins Estate was: “The bonds above mentioned are to be delivered to you.” This was accepted by the Hopkins letter in terms as follows: “You may therefore ship the bonds described in your letter to us.” [12]

In *Mayo vs. Price*, 218 S. W. (Mo.), 932, plaintiff, a wholesaler at Caruthersville, Missouri, received an offer from the defendant to sell plaintiff two carloads of potatoes, by telegram, using this language:

“With shipment as quick as can get cars dollar twenty-seven delivered.”

The offer was accepted by the plaintiff and defendant having defaulted in the contract, plaintiff brought an action for damages. The Court thus construed the word “delivered”:

“We must overrule the contention that the contract does not require a delivery of the potatoes at Caruthersville. The plaintiff’s place of business was Caruthersville, and when defendant by telegram from St. Joseph, Missouri, offered to sell plaintiff two cars of potatoes at the named price delivered, there could be but one fair meaning to the offer and that is delivery at Caruthersville.”

And so in this case, Morris Brothers having proposed in its letter to deliver the bonds to the Hopkins Estate and the Estate having confirmed this by requesting that the bonds be shipped to it, agreed to the proposal and thereafter Morris Brothers was obliged to do exactly what it stipulated in this letter. This contract Morris Brothers did not complete and all risks in the premises were with it, at least until the bonds were insured and deposited in the registered mail, addressed as agreed upon, and very likely, I should say, the risk

was its until the bonds reached the Estate, upon the theory that the carrier was the agent of Morris Brothers until the property reached its destination and was delivered.

In all such cases the Courts hold the sale is not completed until delivery is made as agreed upon.
[13]

Thus, in the case of Winklemeyer Brewing Company vs. Kipp, 50 Pac. Rep.) (Kan.) 956, there was a contract for the sale of a shipment of liquors by the plaintiff, a resident of St. Louis, to one Saunders, a resident of the state of Kansas. According to the contract, the freight was to be paid by Winklemeyer. The decision of the Court is as follows:

“The contract of sale was therefore complete when Saunders mailed the letter or sent the telegram ordering a carload of liquor. The contract of sale is complete, but the sale is not. Something more remains to be done. The liquors must be separated and delivered to Saunders before the sale is completed. It is clear that the separation took place in St. Louis. The delivery is ordinarily made to the purchaser by delivery to the carrier. Where the purchaser is to pay the freight, the carrier is his agent. The illegality of the sale of intoxicating liquors frequently depends upon the place where the sale is made. This is governed by the place where the sale is completed by

delivery. Where the vendor is to and does pay the freight to the place of delivery, the place of delivery becomes the place of sale. If by the terms of the contract the seller is required to send or forward the goods to the buyer, the title and risk remain in the seller until the transportation is at an end, after which time the title is vested in the buyer."

Every step taken by Morris Brothers in this matter, as the record shows, indicates that it recognized an obligation [14] to deliver the bonds at Lock Haven. It was to pay the transportation charges, slight as they might have been, and the insurance was to be taken, not in favor of the Hopkins Estate, but in favor of Morris Brothers.

Under the authority of the Mayo case, *supra*, the language "we are to deliver these bonds to you" meant at Lock Haven, or at least to the carrier, in this instance, the United States mail, and the quoted language which follows that declaration certainly strengthens this interpretation and is a statement of the manner in which it is proposed to make the delivery.

The segregation so much relied upon, isolatedly considered, is of no importance, for it is manifest that Morris Brothers could not have maintained an action for the price merely because it set the bonds aside in its place of business, and if, after such segregation, they had been destroyed or stolen, is it reasonable to suppose that the bankrupt would have been accorded a remedy in any court in an action to recover their value against the estate in

such circumstances? Surely not, especially in the face of the statute mentioned.

The only importance that may attach to the act of segregation, as it appears to me, is that, taken in connection with payment in full by the claimant, it may furnish some foundation for the contention that thereafter Morris Brothers might be considered the agent of the claimant for making delivery of the bonds to the carrier. But this contention is swept aside by the contract to deliver at Lock Haven and the Oregon law above quoted which rules that property does not pass where the contract requires delivery to the buyer or [15] prepayment of cost of transportation, etc. Under this statute it is certain that Morris Brothers could not take the position as against the Hopkins Estate that it was Hopkins' agent, and if it could not, neither may the Hopkins Estate, for remedies must be mutual.

In all cases of this character in courts of bankruptcy, the petitioner has the burden and is required to show by clear and satisfactory proof that it is entitled to withdraw specific property from the estate as against the vital interests of the other creditors therein, and if there is reasonable doubt about this right, it must be resolved against petitioner.

It is my opinion that the petitioner herein has not sustained this burden, and for the reasons stated its petition to reclaim must be disallowed, and it will be allowed a general claim against the estate.

A. M. CANNON,
Referee.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition is hereby accepted in Multnomah county, Oregon, this 16th day of July, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for petitioners.

JOHN P. WINTER,
By W. G. SMITH,
Attorney for Trustee.

Filed July 16, 1921. A. M. Cannon, Referee.
Allowed July 19, 1921. A. M. Cannon, Referee.
Filed July 19, 1921. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 19th day of July, 1921, there was received from the Referee in Bankruptcy and duly filed in said court petition of the trustees of the A. C. Hopkins Estate for the delivery to them of the property described in said petition, in words and figures as follows, to wit: [17]

In the District Court of the United States for the
District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the Matter of MORRIS BROTHES, INCORPORATED, a Corporation,
Bankrupt.

Petition of Trustees of Hopkins Estate for Delivery of Property.

To the District Court of the United States for the District of Oregon:

The petition of William P. Hopkins and I. A. Shaffer, Jr., Trustees of the estate of A. C. Hopkins, respectfully shows:

I.

Your petitioners are the duly qualified and acting trustees of the estate of A. C. Hopkins.

II.

Petitioners are the owners and entitled to the immediate possession of the following described personal property:

Bay City 6% bonds, due 1934.....	\$10,000.00
Bonner county, Idaho, Independent	
School District No. 1 bonds, due	3,000.00
1932	3,000.00
Bonner county, Idaho, Independent	
School District No. 1 bonds, due	
1933.....	3,000.00
Bonner county, Idaho, Independent	
School District No. 1 bonds, due	
1934.....	4,000.00
Fremont and Madison counties, Idaho,	
Joint School District No. 8 bonds,	
due 1935.....	3,000.00
Fremont and Madison counties, Idaho,	
Joint School District No. 8 bonds,	
due 1936.....	3,000.00

Fremont and Madison counties, Idaho, Joint School District No. 8 bonds, due 1937.....	3,000.00
[18]	
Fremont and Madison counties, Idaho, Joint School District No. 8 bonds, due 1938.....	\$3,000.00
Fremont and Madison counties, Idaho, Joint School District No. 8 bonds, due 1939.....	3,000.00
Heyburn-Paul Highway District, Min- doka county, Idaho, due 1934.....	5,000.00
Rigby Independent School District No. 5, Jefferson county, Idaho, due 1932..	3,000.00
Rigby Independent School District No. 5, Jefferson county, Idaho, due 1933..	4,000.00
Rigby Independent School District No. 5, Jefferson county, Idaho, due 1934..	3,000.00
Buhl Highway District Twin Falls county, Idaho, due 1935.....	10,000.00

III.

Petitioners on or about the 9th day of December, 1920, contracted with Morris Brothers, Incorporated, the above-named bankrupt, for the purchase from it by petitioners of the bonds hereinabove described. Subsequently and on December 15, 1920, the purchase was consummated and on or about December 20, 1920, petitioners paid to Morris Brothers, Incorporated, the sum of Sixty-one thousand dollars (\$61,000.00) for the purpose of having the same applied in satisfaction of

the purchase price of the bonds described. Thereafter, as petitioners are informed and believe, said bonds were secured by the bankrupt from its office at San Francisco and elsewhere, and said bonds were segregated and appropriated to the purchase so made by petitioners and became and were petitioners' property; and at and immediately prior to the adjudication herein, the said [19] bankrupt had prepared to make delivery and was about to make delivery to petitioners of the bonds so purchased by them.

IV.

Heretofore and before the filing of this petition, due demand was made by your petitioners upon E. C. Bronaugh, Esquire, Trustee, that he deliver possession of said property, but delivery has not been made.

WHEREFORE, petitioners respectfully pray that E. C. Bronaugh, Esquire, as trustee herein, be directed to deliver to your petitioners the said property hereinabove listed.

Dated March 9, 1921.

WILLIAM P. HOPKINS,

I. A. SHAFFER, Jr.,

Trustees of the Estate of A. C. Hopkins.

By CAREY & KERR,

C. A. HART,

Their Attorneys.

Filed March 21, 1920. A. M. Cannon, Referee.
Filed July 19, 1921. G. H. Marsh, Clerk. [20]

AND AFTERWARDS, to wit, on the 19th day of July, 1921, there was received from the Referee in Bankruptcy and duly filed in said court an answer of the Trustee in Bankruptcy to the petition of the trustees of the A. C. Hopkins Estate, in words and figures as follows, to wit: [21]

In the District Court of the United States for the
District of Oregon.

B-5653.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Answer in Reclamation of the Petition of William
P. Hopkins and I. A. Shaffer, Jr., Trustees of
the Estate of A. C. Hopkins.**

Earl C. Bronaugh, as Trustee in Bankruptcy of the estate of the above-named bankrupt, answering the petition of the claimants herein, shows and alleges upon information and belief:

I.

Admits paragraph I of plaintiff's petition.

II.

Denies paragraph II of plaintiff's petition.

III.

Denies paragraph III of plaintiff's petition, excepting that the Trustee admits that petitioners, on or about the 9th day of December, 1920, contracted with Morris Brothers, incorporated, the

above-named bankrupt, for the purchase from said bankrupt by petitioners of the bonds in said petition described, and the Trustee admits that the sum of \$61,000.00 was paid to the bankrupt on account of said purchase.

IV.

Admits paragraph IV of plaintiff's petition.

The Trustee, further answering said petition, and for a further and separate defense thereto alleges:

I.

That all the bonds described and set out in plaintiff's petition came into the possession of the Trustee with the exception of \$10,000.00 Port of Bay City, Oregon, six per cent bonds, and that said Port of Bay City, Oregon, six per [22] cent bonds were never purchased by or delivered to Morris Brothers, Inc., and that all of said bonds described and set out in plaintiff's petition are now in the possession of the Trustee, excepting said \$10,000.00 Port of Bay City, Oregon, six per cent bonds.

II.

That Morris Brothers, Inc., the bankrupt, never delivered said bonds described and set out in plaintiff's petition to the petitioners, or anyone else on their behalf, and that said bonds with the exception of said \$10,000.00 Port of Bay City, Oregon, six per cent bonds came into and are now in the possession of the Trustee, and are a part of the assets of said bankrupt estate, and that the petitioners are not entitled to the delivery of said bonds from

the Trustee, but stand only in the relation of creditors of Morris Brothers, Inc., the bankrupt herein.

Wherefore, the Trustee demands judgment, dismissing the petition of the claimants herein.

EARL C. BRONAUGH,

As Trustee in Bankruptcy of Morris Brothers, Inc.,
309 Stark Street, Portland, Oregon.

JOHN P. WINTER and

M. F. DOLPH,

Attorneys for Trustee.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, Earl C. Bronaugh, being first duly sworn, depose and say that I am the duly elected Trustee of the above-entitled bankrupt estate; that I have read the foregoing answer to the petition, and that the statements contained therein are true, according to the best of my knowledge, information and belief.

EARL C. BRONAUGH. [23]

Subscribed and sworn to before me this 1st day of April, 1921.

[Seal]

MARION F. DOLPH,

Notary Public for the State of Oregon.

My commission expires May 26, 1924.

District of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah county, Oregon, this 1st day of April, 1921, by receiving a copy thereof, duly

certified to as such by M. F. Dolph, of attorneys for trustee.

CHARLES A. HART,
Attorneys for Petitioner.

Filed April 1, 1921. A. M. Cannon, Referee in Bankruptcy—Oregon. Filed July 19, 1921. C. H. Marsh, Clerk. [24]

AND AFTERWARDS, to wit, on the 19th day of July, 1921, there was received from the Referee in Bankruptcy and duly filed in said court a stipulation as to the evidence, in words and figures as follows, to wit: [25]

In the District Court of the United States for the District of Oregon.

No. B-5653—IN BANKRUPTCY.

In the Matter of MORRIS BROTHERS, INC., a Corporation, Bankrupt.

Stipulation in Reclamation Claim of Hopkins Estate.

The parties stipulate that the statement hereto annexed, marked Exhibit "A" is a true and correct statement of the facts concerning the municipal bonds covered by the transaction initiated December 9, 1920, by one of the Trustees of the Hopkins Estate with Morris Brothers, Incorporated. All of the bonds described in this statement which on December 9, 1920, were in the possession of the National Bank of Commerce of Seattle, were covered

by a so-called repurchase agreement, the form of which is indicated by the document annexed hereto and marked Exhibit "B." All of such bonds were secured by Morris Brothers from the National Bank of Commerce on December 17, 1920, and were thereupon set apart in a separate container included in a package marked with the name of the Hopkins Estate.

The \$8,000.00 of Buhl Highway bonds which were in the possession of the Central National Bank of Oakland were under hypothecation to secure loans. These bonds were returned to Morris Brothers December 22, 1920, and were thereupon placed with the Hopkins package of bonds hereinabove referred to. The \$5,000.00 of Bonner County School District bonds in the possession of the United States National Bank of Portland were under hypothecation and were returned to Morris Brothers December 14, 1920, and were thereupon placed in said package in said separate container.

Dated this 5th day of May, 1921.

CAREY & KERR,

C. A. HART,

Attorneys for Petitioner.

J. P. WINTER,

Attorney for Trustee in Bankruptcy. [26]

Exhibit "A."

Description of Bonds Maturity	Owned December 9, 1920	Claimed under Hopkins	Location	December 9	Segregation	
					Nos.	Date
Rigby Ind. S. D. #5 do do Buhl Highway Dist. win Falls County	1932	9-10-11-12			9-10-11	Dec. 17-20
	1933	13-14-15-16	National Bk. Comm. Seattle		13-14-15-16	do
	1934	17-18-19-20	do		17-18-19	do
	1935	273-8	273-8 & 237		273-8, 280	Dec. 22-20
Tinnidoka Co. eyburn-Paul Dist.	280, 256, 257 267	12000	Nat'l Bk. Oakland		256-7, 269	Dec. 17-20
	1934	91-2-3-4-5	256-7 National Bank Commerce, Seattle		91-2-3-4-5-92-5	12-10-20
		5000	92-5 in stock		91	12-17-20
		5000.00	91 in National Bank Commerce, Seattle			
Vremont & Madison Joint S. D. #8 do do do Bonner Co. nd. S. D. #1 do do Port of Bay City	1935	11-12-13	In stock		11-12-13	12-10-20
	1936	14-15-16	"		14-15-16	12-10-20
	1937	17-18-19	"		17-18-19	12-10-20
	1938	20-21-22	"		20-21-22	12-10-20
Port of Bay City	1939	23-24-25	"		23-24-25	12-10-20
	1932	16-17-18-19	U. S. National Bank Portland		16-17-18	12-14-20
	1933	24-25-26	24-25 U. S. Nat. Bk. Portland		24-25	12-14-20
	1934	29-30-21-32	Nat. Bank Commerce Seattle		29-30-31-32	12-17-20
None owned and none secured prior to December 24, 1920.						

Exhibit "B."

Seattle, Washington, —.

For and in consideration of the purchase this day from us at the sum of \$—— by the National Bank of Commerce of those certain securities numbered —— of the face value of \$——, bearing date of the —— day of ——, made by —— payable to the order of ——, we hereby jointly and severally guarantee the payment of the entire principal and interest of said securities and each of them according to the terms thereof. The bank shall not be bound to exhaust its resource or to make any demand or to take any action whatever against any party thereon before being entitled to payment from the undersigned and each of them of the amount hereby guaranteed, but may, at its option, make such demands and take such action for the purpose of securing payment thereof as may to the bank seem advisable. We jointly and severally agree to remain bound notwithstanding any extensions or renewals of said securities, or any of them, and consent is hereby given to any such extensions or renewals as the bank may at its option choose to grant or accept. We further jointly and severally agree to repurchase said securities, or such of them as the bank may from time to time desire us to repurchase at any time hereafter, upon demand of said bank, and to pay therefor the sum of \$—— for each of said \$—— [28] so repurchased, with interest thereon at the rate of —— per centum per annum from this date until date of purchase, less,

however, any interest meanwhile collected by said bank on said security so repurchased. Notice of default on the part of any party to any of said securities is hereby waived.

MORRIS BROTHERS, INC.,

By _____.

Dated ———.

Filed July 12, 1921, A. M. Cannon, Referee.

Filed July 19, 1921. G. H. Marsh, Clerk. [29]

AND AFTERWARDS, to wit, on the 8th day of August, 1921, there was duly filed in said court an order of the Court affirming the order of the Referee in Bankruptcy and denying the petition of the trustees of the A. C. Hopkins Estate, in words and figures as follows, to wit:
[30]

In the District Court of the United States for the District of Oregon.

No. B-5653.

August 8, 1921.

In the Matter of MORRIS BROTHERS, Bankrupt.

**Order Affirming Order of Referee and Denying
Petition of Trustees of Hopkins Estate.**

This cause was heard by the Court upon review of the order of H. M. Cannon, Referee in Bankruptcy herein, denying the petition of the trustees of the estate of A. C. Hopkins for an order direct-

ing the trustee of the estate of the above-named bankrupt to deliver to them certain bonds described in said petition; the said trustees of the estate of A. C. Hopkins appearing by Mr. Charles A. Hart, of counsel, and the trustee of the estate of the above-named bankrupt appearing by Mr. John P. Winter, of counsel;

On consideration whereof, IT IS NOW ORDERED AND ADJUDGED, that the order of the said Referee, denying the petition of the trustees of the estate of A. C. Hopkins, be, and the same is hereby, affirmed, and it is further ordered that the petition of the trustees of the estate of said A. C. Hopkins for the delivery to them by the trustee of the estate of the above-named bankrupt of the bonds described in the said petition be, and the same is hereby, denied.

R. S. BEAN,
Judge.

Filed August 8, 1921. G. H. Marsh, Clerk. [31]

AND AFTERWARDS, to wit, on the 8th day of August, 1921, there was duly filed in said court an opinion of the Court on review of the order of the Referee in Bankruptcy, in words and figures as follows, to wit: [32]

In the District Court of the United States for the District of Oregon.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

Opinion on Review of Order of Referee.

MEMORANDUM by BEAN, District Judge:

On Petition for Review of Ruling of the Referee on Application of Estate of A. C. Hopkins, of Lockhaven, Pennsylvania, for an Order Requiring the Trustee to Deliver to It Certain Bonds.

The facts are not in dispute. On December 9, 1920, Mr. Hopkins, one of the trustees of the petitioner, called at the place of business of the bankrupt in Portland and after examining bonds listed by it for sale placed an order for sixty thousand dollars worth of various municipal bonds, subject to the approval of his co-trustee, Mr. Schaffer, who resides at Lockhaven. The next day the bankrupt wrote to Mr. Schaffer advising him that Hopkins had, subject to his approval, placed an order for bonds of various municipalities, giving the amounts, rate of interest, date of maturity, and price, without, however, specifying any particular **bond or** bonds, and saying that "the bonds above mentioned are to be delivered to about December 23d or 24th, and we are to send the same via registered mail, insured, addressed to the Estate of A. C. Hopkins, Lockhaven, Penn." On December 15th, Mr. Schaffer acknowledged receipt of the letter, approved the purchase, and directed that the bonds be "shipped to us, payment for which will be arranged by Mr. Hopkins." A few days later the

bankrupt received a letter from the petitioner enclosing a check for \$61,000.000, "to apply on [33] a purchase of municipal bonds made from you on December 9th," and requesting that the bonds be sent to Mr. Schaffer as agent of the Hopkins Estate at Lockhaven, Pennsylvania.

At the time the order was received and approved, bonds answering the description contained in the bankrupt's letter of December 10, amounting to nineteen thousand dollars, were then owned and in the possession of the bankrupt and were all of such issues owned by it. Others were hypothecated in various quarters, and ten thousand dollars of the bonds agreed to be sold were not owned by the bankrupt and never came into its possession.

Immediately upon receipt of the order, the bankrupt began to assemble bonds to fill it and by the 24th of December fifty thousand dollars in bonds answering the description contained in the letter of December 10 had been assembled and put in an envelope, and the name "Hopkins Estate" written across it, preparatory to forwarding the bonds to the purchaser at Lockhaven, Pennsylvania. Before the shipment was made, bankruptcy ensued.

The question for decision, therefore, is: Did the title to the particular bonds which had been set aside and placed in a separate container by the bankrupt pass to the petitioner or remain with the bankrupt?

Many authorities have been referred to and examined as bearing upon the question, but it is

unnecessary to cite or refer to them in detail, for the question is primarily one of intention, to be determined by the terms of the contract and the circumstances surrounding the transaction. The contract is contained in the letter of the bankrupt to Mr. Schaffer of December 10, and his reply thereto. In the former, it is [34] stated that the bonds are to be forwarded by registered mail to the purchaser at Lockhaven, Pennsylvania, and in the latter that they "are to be shipped to us."

It is therefore quite clear that it was the intention of the parties that the bonds were to be forwarded by the seller by registered mail to the buyer at Lockhaven, Pennsylvania, and in my judgment the title would not pass until this condition was complied with. (See Rule 5, section 8182, Olson's Oregon Laws.)

It is to be observed the contract was not for the sale and purchase of certain specific bonds, but only of bonds of certain issues, denomination, maturity, and rate of interest. The delivery by the seller of any bonds, whether then owned or afterward acquired, answering this general description, would have been a compliance with the contract. The selection by the seller of the particular bonds which it intended to deliver under the contract was not irrevocable. Notwithstanding such selection, it could thereafter have substituted others of like kind. All the buyer could demand was that when the time for performance arrived, bonds of the

description and quality specified in the contract should be delivered.

It follows that the order of the referee should be affirmed, and it is so ordered.

Filed August 8, 1921. G. H. Marsh, Clerk. [35]

AND AFTERWARDS, to wit, on the 17th day of August, 1921, there was duly filed in said court a Petition of the Trustees of the A. C. Hopkins Estate for a rehearing, in words and figures as follows, to wit: [36]

In the District Court of the United States for the District of Oregon.

No. B-5653.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Petition for Rehearing and Reopening Proceedings
Upon Reclamation Claim of Trustees of Estate
of A. C. Hopkins.**

Now come William P. Hopkins and I. A. Shaffer, Jr., trustees of the estate of A. C. Hopkins, and petition the Court for a rehearing upon the petition of the undersigned trustees for a review of the ruling of the Referee in Bankruptcy herein denying said trustees' reclamation petition for the delivery of certain bonds; and petitioners further pray that upon such rehearing leave be granted to

take additional testimony in support of petitioners' reclamation petition.

This petition is based upon the record herein and upon the accompanying affidavits of Charles A. Hart, William P. Hopkins, and Fred S. Glenn.

Dated this 15th day of August, 1921.

CAREY & KERR,

C. A. HART,

Attorneys for Petitioners. [37]

In the District Court of the United States for the
District of Oregon.

No. B-5653.

In the Matter of MORRIS BROTHERS, INCORPORATED,

Bankrupt.

Affidavit of Charles A. Hart.

State of Oregon,

County of Multnomah,—ss.

I, Charles A. Hart, being duly sworn, depose and say that I am one of the attorneys representing the Trustees of the Estate of A. C. Hopkins in the proceedings relating to the reclamation of certain bonds in possession of the Trustee in Bankruptcy of Morris Brothers, Incorporated.

I further depose and say:

Petitioners' reclamation petition was filed with the Referee in Bankruptcy in the matter of Morris Brothers, Incorporated, Bankrupt, in March, 1921. Thereafter the Trustee in Bankruptcy filed his an-

swer and a hearing before the Referee in Bankruptcy was had during the month of April, 1921. At the conclusion of the hearing petitioners filed their brief with the Referee in Bankruptcy and thereafter and subsequent to June 1, 1921, an answering brief was filed by the Trustee in Bankruptcy.

The petitioners in said reclamation proceeding, and affiant as their attorney, were not advised until the time when the brief of the Trustee in Bankruptcy was filed, of the position taken by the Trustee in defense of petitioners' claim. Neither the answer of the Trustee in Bankruptcy nor any of the proceedings during the hearing before the Referee disclosed that the Trustee in Bankruptcy intended to rely upon the claim that Morris Brothers in making a contract of [38] sale of the bonds claimed to petitioners prior to bankruptcy obligated itself to make delivery of the bonds sold to petitioners at Lockhaven, Pennsylvania.

For this reason affiant offered no testimony during the hearing before the referee to show what, if any, conversation was had or what, if any, arrangement was made between the parties concerning the delivery of the bonds purchased. The day following the making of the tentative purchase contract between William P. Hopkins, one of the petitioners, and Fred S. Glenn, Vice-president of Morris Brothers, Incorporated, said Glenn reported the transaction by letter to I. A. Shaffer, Jr., co-trustee of said William P. Hopkins, but no copy of said

letter was sent to William P. Hopkins, and said letter was not a reduction of the oral contract theretofore made to writing.

At the time of the hearing before the Referee, petitioners introduced the testimony of Fred S. Glenn on other matters than the question of delivery, and because the defense based upon an alleged obligation to deliver had not then been made, the witness Glenn was not questioned regarding delivery nor was the petitioner, William P. Hopkins (who made the purchase) examined as a witness on any subject.

For these reasons the petitioners had no opportunity of submitting evidence on the question of whether or not the contract of purchase so made between petitioner, William P. Hopkins, and Fred S. Glenn, Vice-president of Morris Brothers, Incorporated included any obligation to make delivery of the bonds at Lockhaven, Pennsylvania.

Affiant is informed and believes that petitioner, William P. Hopkins, and said Fred S. Glenn, if called and sworn as witnesses in these proceedings, will testify that the contract of purchase so made included no obligation whatsoever on the part of Morris Brothers, Incorporated, to make delivery [39] of the bonds at any time or place, but, on the contrary, that the statement made in the letter dated December 10, 1920, from Fred S. Glenn to I. A. Shaffer, Jr., referred to directions given by petitioner, William P. Hopkins, at the conclusion of the oral arrangement for the purchase of the bonds, which directions were as follows, to wit:

When petitioner, William P. Hopkins, called upon said Fred S. Glenn on December 9, 1920, said Fred S. Glenn exhibited to said Hopkins the listings of Morris Brothers, Incorporated, comprising bonds then claimed to be owned and for sale by Morris Brothers, Incorporated. After said Hopkins had made his selection of bonds which, subject to the approval of his co-trustee, he desired to purchase, said Hopkins stated to said Glenn that the Hopkins Estate would not have its money ready or be prepared to take up the bonds purchased until about the 23d day of December, 1920. Said Hopkins further stated that the Hopkins Estate expected to receive a payment of sufficient funds on or about the date specified and that he, Hopkins, upon receipt of the money, would at once forward a check to Morris Brothers, Incorporated, to take up the bonds. Said Hopkins further stated that when the bonds were so paid for and taken up, they were to be mailed to the office of the Hopkins Estate at Lockhaven, Pennsylvania.

This affidavit is made in support of petitioners' application for rehearing and for a reopening of their reclamation claim.

CHARLES A. HART.

Subscribed and sworn to before me this 15th day of August, 1921.

[Seal]

ROBERT B. KUYKENDALL,

Notary Public for Oregon.

My commission expires September 1, 1924. [40]

In the District Court of the United States for the
District of Oregon.

No. B-5653.

In the Matter of MORRIS BROTHERS, INCOR-
PORATED, a Corporation,
Bankrupt.

Affidavit of William P. Hopkins.

State of Idaho,
County of Kootenai,—ss.

I, William P. Hopkins, being first duly sworn,
depose and say:

I am one of the Trustees of the Estate of A. C. Hopkins, and am the representative of that estate who negotiated with Fred S. Glenn on December 9, 1920, for the purchase of certain bonds from Morris Brothers, Incorporated.

I further depose and say:

I went to Portland, Oregon, on December 9, 1920, for the purpose of going over the bonds then being offered for sale by Morris Brothers, Incorporated. I was referred to Mr. Fred S. Glenn and he spent a considerable time going over with me the bonds then listed by Morris Brothers and offered for sale. All of the bonds discussed at that time and all of the bonds selected by me and purchased (subject to the approval of my co-trustee, I. A. Shaffer, Jr.) were, as I was informed and believe, bonds then owned and for sale by Morris Brothers. I was not advised at any time that any of the bonds which

I selected were not in the possession of Morris Brothers or in stock; nor did Mr. Glenn or any representative of Morris Brothers inform me that the particular maturities of Bay City bonds which I desired were not then among the Bay City bonds owned by or in the possession of Morris Brothers, Incorporated. [41]

After examining the listings and discussing the bonds with Mr. Glenn, I advised him of the particular bonds which I would purchase subject to the approval of my co-trustee, I. A. Shaffer, Jr. I further informed him that I was certain that Mr. Shaffer would approve the purchase and directed him at once to forward all information about the bonds to Mr. Shaffer.

After the purchase had been thus made on December 9, 1920 (subject to the approval of my co-trustee, as aforesaid), I stated to Mr. Glenn that the Hopkins Estate would not be prepared to pay for the bonds or to take them up until about December 23, 1920. I further stated to Mr. Glenn that the Hopkins Estate expected to receive a payment of a substantial sum on or about the date named, and that when said payment came in, I would at once forward to Morris Brothers, Incorporated, a check for the full amount of the purchase price. I further stated to Mr. Glenn that when the bonds had thus been paid for and taken up, I desired to have them mailed to the office of the Hopkins Estate at Lockhaven, Pennsylvania.

Nothing further on the subject of delivery of the

bonds was said at the time the purchase was made on December 9, 1920. The manner of transmitting the bonds and their protection during transit was not mentioned and there was no statement made at any time with respect to any obligation on the part of Morris Brothers, Incorporated, to effect delivery of the bonds at Lockhaven, Pennsylvania. Subsequent to the bankruptcy, I was furnished with a copy of Mr. Glenn's letter to Mr. Shaffer, dated December 10, 1920. The reference therein to delivery on December 23 or 24 related, so far as I understood the negotiations of the day before with Mr. Glenn, to my statement [42] to him that the Hopkins Estate would not be prepared to pay for or take up the bonds until the day named; and the reference in said letter to the shipment of the bonds registered and insured to the Hopkins Estate at Lockhaven, Pennsylvania, related to the direction given by me to Mr. Glenn to the effect that when the bonds were so paid for and taken up, I desired to have them mailed to the office of the Hopkins Estate at Lockhaven, Pennsylvania.

No other representative of the Hopkins Estate participated in any way in the making of the purchase of these bonds, and there was never any agreement or understanding or condition of purchase that Morris Brothers should make delivery of the bonds purchased at Lockhaven, Pennsylvania. I informed Mr. Glenn that I would take up the bonds by payment of the purchase price on or about December 23 or 24, and that I then desired to have

them mailed to the office of the Estate at Lockhaven, Pennsylvania. This direction comprises all that was said on the subject of delivery of the bonds, and was the only direction given by me to Mr. Glenn on the subject.

WILLIAM P. HOPKINS.

Subscribed and sworn to before me this 14th day of August, 1921.

EDWARD H. BERG,
Notary Public for Idaho, Residing at Coeur d'Alene,
Idaho.

My commission expires May 17, 1923. [43]

In the District Court of the United States for the
District of Oregon.

No. B-5653.

In the Matter of MORRIS BROTHERS, INCOR-
PORATED,

Bankrupt.

Affidavit of Fred Glenn.

State of Oregon,
County of Multnomah,—ss.

I, Fred Glenn, being first duly sworn, depose and say:

On and prior to December 9, 1920, I was in the employ of Morris Brothers, Incorporated, and was the representative of that company who negotiated a sale of certain bonds to the Estate of A. C. Hopkins, represented by William P. Hopkins, of Spokane, Washington, on December 9, 1920. I also wrote

on behalf of Morris Brothers, Incorporated, a letter, dated December 10, 1920, addressed to I. A. Shaffer, Jr., which is claimants' Exhibit 1 in the reclamation proceedings of the Trustees of the Hopkins Estate in the bankruptcy proceedings of Morris Brothers, Incorporated.

When the sale of the bonds referred to was negotiated with Mr. William P. Hopkins on December 9, 1920, I discussed with Mr. Hopkins each of the bond issues in which he was interested. All of the bonds which were included in the contract of purchase were among the listings of Morris Brothers, Incorporated, and were then being offered for sale. I was not advised at the time as to which of the bonds were then in stock and which of them were hypothecated with different banks, but all of the bonds were included in the listings then on sale by Morris Brothers, Incorporated; excepting that the particular maturities of Bay City bonds desired by Mr. Hopkins were not owned at the time by Morris [44] Brothers. I did not advise Mr. Hopkins of this fact because Morris Brothers, Incorporated, then had a contract with the Port of Bay City under the terms of which the maturities desired could readily be secured. When Mr. Hopkins concluded his selection of the bonds desired, he stated that he was certain there was no doubt that his cotrustee would approve the purchase, but that he desired to secure such approval before the purchase should become absolute; and he thereupon requested me to forward all papers con-

cerning the different bond issues to the cotrustee, Mr. Shaffer, at Lockhaven, Pennsylvania.

After Mr. Hopkins' selection of bonds had been made and after directions were given to me to forward information about the bonds to Mr. Shaffer, Mr. Hopkins stated that the Hopkins Estate would not be prepared to pay for the bonds and take them up until about December 23, 1920. He stated further that the estate expected to receive a payment in a substantial amount on or about that date and that when it was received, he would forward at once a check for the total amount of the purchase price, so that the bonds could be taken up at that time. He further stated that when the bonds were so paid for and taken up, he desired that they should be mailed to his cotrustee, Mr. Shaffer, at Lockhaven, Pennsylvania.

These directions, so far as I can recall, were the only ones given and they cover all that was said concerning the taking up of the bonds and what was to be done with them after they were paid for. In writing the cotrustee, Mr. Shaffer, on December 10, 1920, I referred to these directions and stated that delivery was to be made about December 23 or [45] 24, which was the date given me by Mr. Hopkins as the time when payment would likely be made. I further stated in my letter to Mr. Shaffer that the bonds would be sent registered and insured, and this statement regarding registering and insurance was made because of the fact that the practice of registering and insuring bonds was invariably fol-

lowed by Morris Brothers whenever bonds were mailed to a customer.

FRED GLENN.

Subscribed and sworn to before me this 15th day of August, 1921.

[Seal]

MARVIN K. HOLLAND,

Notary Public for Oregon.

My commission expires September 12, 1923.

State of Oregon,

County of Multnomah,—ss.

Due service of the within petition for rehearing, etc., is hereby accepted in Multnomah county, Oregon, this 17th day of August, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for petitioners.

M. F. DOLPH,

Of Attorneys for Trustee in Bankruptcy.

Filed August 17, 1921. G. H. Marsh, Clerk. [46]

AND AFTERWARDS, to wit, on the 29th day of August, 1921, there was duly filed in said court an order of the Court granting a rehearing on the petition of the trustees of the A. C. Hopkins Estate and referring the petition to the Referee in Bankruptcy for further proceedings, in words and figures as follows, to wit: [47]

In the District Court of the United States for the
District of Oregon.

No. B-5653.

August 29, 1921.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Order Granting Rehearing and Referring Petition
to Referee.**

The Court having considered the petition for rehearing filed by the trustees of the A. C. Hopkins Estate and being fully advised, it is ORDERED that the order heretofore on August 8, 1921, entered herein, denying the petition of the trustees of the said A. C. Hopkins Estate, be and the same is hereby vacated and set aside and that a rehearing be granted upon the said petition; and it is further ordered that the said petition be re-referred to A. M. Cannon, Referee in Bankruptcy, as a special master, to take such further testimony as may be offered by any of the parties to the said petition, and that he report said testimony together with his findings to this Court.

R. S. BEAN,
Judge.

Filed August 29, 1921. G. H. Marsh. Clerk. [48]

AND AFTERWARDS, to wit, on the 26th day of October, 1921, there was received from the Referee in Bankruptcy and duly filed in said court, certificate of the Referee in Bankruptcy for review of the order of the Referee, in words and figures as follows, to wit: [49]

In the District Court of the United States for the District of Oregon.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Referee's Certificate on Review Denying the
Petition of A. C. Hopkins Estate for
Reclamation.**

The undersigned Referee in Bankruptcy, having considered the petition for reclamation of A. C. Hopkins Estate upon the testimony heretofore adduced and upon the additional testimony adduced under the order of this Court setting aside the order heretofore entered herein disallowing said petition, has the honor to certify that on the 18th day of October, 1921, an order was made and entered by the undersigned again disallowing said petition for the reasons stated in the order.

The petitioner thereupon, being aggrieved at the order so made, filed its petition for review on October 22, 1921, which petition was duly allowed, and the question now for decision is whether the

order, copy of which is attached to the petition for review, was properly made and is correct in law.

I hand up with this certificate the petition for review, the original testimony and exhibits and also the supplementary testimony and exhibits taken and filed in this cause.

Dated, October 26, 1921.

A. M. CANNON,

Referee in Bankruptcy.

Notice of the filing of the above certificate mailed October 26, 1921, to C. A. Hart and to John M. Winter.

G. H. MARSH,

Clerk.

Filed October 26, 1921. G. H. Marsh, Clerk. [50]

AND AFTERWARDS, to wit, on the 26th day of October, 1921, there was received from the Referee in Bankruptcy and duly filed in said court a petition of the trustees of the A. C. Hopkins estate for review of the order of the Referee in Bankruptcy, in words and figures as follows, to wit: [51]

In the District Court of the United States for the District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the Matter of MORRIS BROTHERS, INC.,
a Corporation, Bankrupt.

**Petition for Review of Referee's Order Disallowing
on Rehearing Reclamation Claim of A. C.
Hopkins Estate.**

To A. M. CANNON, Esquire, Referee in Bankruptcy:

Your petitioners, William P. Hopkins and I. A. Shaffer, Jr., Trustees of the Estate of A. C. Hopkins, respectfully show:

I.

Your petitioners claim to be the owners of the following described municipal bonds and have heretofore filed in this proceeding their reclamation petition seeking to have an order made turning said property over to them:

Numbers	Description	of Bonds.	Maturity.	Amount.
Nos. 9, 10, and 11,	Rigby Inde-			
	pendent School District No. 5..	1932	\$	3,000.00
Nos. 13, 14, 15, 16,	Rigby Inde-			
	pendent School District No. 5..	1933		4,000.00
Nos. 17, 18, and 19,	Rigby Inde-			
	pendent School District No. 5..	1934		3,000.00
Nos. 273 to 278, inclusive, Nos.				
	280, 256, 257, and 269, Buhl			
	Highway District, Twin Falls			
	county	1935		10,000.00
Nos. 91, 92, 93, 94, and 95, Hey-				
	burn-Paul Highway District,			
	Minnidoka county	1934		5,000.00

Nos. 11, 12, and 13, Joint School District No. 6, Fremont and Madison counties	1935	3,000.00
Nos. 14, 15, and 16, Joint School District No. 6, Fremont and Madison counties	1936	3,000.00
Nos. 17, 18, and 19, Joint School District No. 6, Fremont and Madison counties	1937	3,000.00
Nos. 20, 21, and 22, Joint School District No. 6, Fremont and Madison counties	1938	3,000.00
Nos. 23, 24, and 25, Joint School District No. 6, Fremont and Madison counties	1939	3,000.00
Nos. 16, 17, and 18, Independent School District No. 1, Bonner county	1932	3,000.00
Nos. 24, 25, and 26, Independent School District No. 1, Bonner county	1933	3,000.00
Nos. 29, 30, 31, and 32, Inde- pendent School District No. 1, Bonner county	1934	4,000.00

II.

On July 14, 1921, an order was made and entered herein disallowing the claim of petitioners to said bonds. Thereafter, upon review of said order, the District Court of the United States on August 8, 1921, made and entered its order affirming the order of the Referee of July 14, 1921. Thereafter, upon application of petitioners, the

District Court of the United States on August 29, 1921, made and entered its order vacating the order of August 8, 1921, [53] and reopening the claim and referring the petitioner's claim to the Referee in Bankruptcy for the purpose of a rehearing and the introduction of such additional testimony as the parties might desire to offer. Thereafter such rehearing was had and on October 18, 1921, an order was made and entered by the Referee herein again disallowing the claim of petitioners to said bonds. A copy of said order of October 18, 1921, is hereto annexed.

III.

Said order of October 18, 1921, was and is erroneous in holding and determining that said bonds are not properly claimants' and in holding and determining that the title to said bonds did not pass to claimants prior to the adjudication of bankruptcy herein, and in disallowing the claim of claimants to said bonds.

WHEREFORE your petitioners pray that said order of October 18, 1921, may be reviewed as provided in the Bankruptcy Law of 1898, and by General Order No. 27.

Dated, October 20, 1921.

WILLIAM P. HOPKINS,

I. A. SHAFFER, Jr.,

Trustees of the Estate of A. C. Hopkins.

By CAREY & KERR,

C. A. HART,

Their Attorneys.

State of Oregon,
County of Multnomah,—ss.

I, Charles A. Hart, being first duly sworn, depose and say that I am one of attorneys for the petitioners described in the foregoing petition. I further [54] depose and say that the statements of fact therein contained are true according to the best of my knowledge, information, and belief.

I further depose and say that I make this verification on behalf of petitioners because neither of said petitioners is within the District of Oregon.

CHARLES A. HART.

Subscribed and sworn to before me this 20th day of October, 1921.

[Seal]

MARVIN K. HOLLAND,
Notary Public for Oregon.

My commission expires September 12, 1923. [55]

AND AFTERWARDS, to wit, on the 26th day of October, 1921, there was received from the Referee in Bankruptcy and duly filed in said court a decision and order of the Referee in Bankruptcy on the petition of the trustee of the A. C. Hopkins Estate, in words and figures as follows, to wit: [56]

In the District Court of the United States for the
District of Oregon.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

Decision and Order of Referee upon Petition of Hopkins Estate for Reclamation.

The order of the District Court, I take it, requires of the Referee a reconsideration of this petition. I judge that the order heretofore entered denying the petition has been set aside, so that it becomes necessary to dispose of the matter again by formal order on my part. As it is certain any order made by me will be reviewed by one or another of the parties, and as, under the rules upon review, I am required to state the reasons underlying any order made, I shall briefly restate my conclusion in the light of the additional testimony taken and what has heretofore been decided by the Court.

It has already been held both by the Referee and the District Court, upon the record as it reached that Court, that the contract between the parties abided in the two letters, Claimant's Exhibits 1 and 2; that such contract obliged the bankrupt to deliver the property to the purchaser at Lockhaven; and that never having done this, no title to the bonds ever passed to the Hopkins Estate.

By the additional testimony taken under the force of this precise decision, it is attempted to be shown that the contract is somewhat different from what the letters clearly indicate it to be. This testimony is a detail of what was said in the conversation between Mr. Hopkins and an agent or employee of Morris Brothers in Portland, on December 9th,

when Mr. Hopkins called for the purpose of [57] looking into this purchase. It is an interpretation that their mutual understanding was that the bonds were both to be paid for and delivered at Portland; that that portion of Exhibit 1, which proposes a delivery at Lockhaven is in fact merely the result of the direction from Hopkins to Morris Brothers to forward the bonds, when delivered, to Lockhaven, Morris Brothers, it must be assumed, acting as agent for the Hopkins Estate. In my opinion this is an obvious effort to vary by parol the terms of written instruments which are clear, easily understood, wholly free from ambiguity, and quite sufficient to constitute a contract, and this is not permissible under the statute of frauds. It does not matter what form of contract parties choose to adopt; if the form happens to be that of letters, and such letters clearly constitute a contract, the Courts are not more at liberty to rewrite or remake that form of contract than they are in the case of most formal documents. Moreover, it is as true now, upon the whole record, as when the case was first decided, that if the letters are not the contract, there never was one. It certainly cannot be pretended that any binding contract, or any contract, resulted from the conversation detailed in this supplementary testimony. Hopkins himself does not claim this. What there transpired was merely talk, and the whole thing depended entirely upon the co-trustee, Shaffer, who must give his assent and approval of the bonds, their legality, price,

et cetera. Manifestly, this he could not do unless or until Morris Brothers had put in writing the nature of the property it proposed to sell him and named a price and other terms of the proposition. This they did in Exhibit 1, and Shaffer acted, [58] not upon the oral conversation had in Portland by Hopkins, of which he knew nothing, but upon the very instrument now before the Court. He accepted all the terms there laid down, thus completing a binding contract upon which he had a right to rely, and doubtless did rely. And it is too late now to argue that the contract does not require a delivery at Lockhaven. It has already been decided that it does, and I feel very sure correctly so decided.

But if both Court and referee are entirely mistaken about these questions; if it be true that the letters are not the contract or, if they are, such contract may be varied by parol, or if the oral conversation now relied upon is insufficient to constitute a contract for the sale of this personal property, under which delivery was to be made at Portland, still it is incontestible, I believe, that the petitioner must nevertheless fail in this reclamation. It has always to be kept in mind that no specific bonds were bargained for. The bonds were sold out of a general mass, the delivery of any part of which fulfilled the contract. Morris Brothers had the exclusive right to make the segregation for delivery, and undoubtedly at any time before delivery could have substituted for the bonds in the marked envelope any other bonds of the same issue and

surely without being charged with conversion in so doing. There is no intimation anywhere in this record that Hopkins Estate knew anything about this action of Morris Brothers, much less that they assented to it and accepted that envelope, sans approval, count, or inspection, thus shifting both title and responsibility in case of loss or destruction.

The uniform sales law of this state is made to fit all such situations and rule 4 thereof provides:

“(1) Where there is a contract to sell unascertained [59] goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after appropriation is made.”

There is not a scintilla of evidence in this record to bring the acts of these parties within the operation of this law. There was no express assent and nothing from which one can be implied. Indeed, it appears affirmatively the petitioner did not assent, for it knew nothing about any such action having been taken. Hence the segregation relied upon does not avail the petitioner, looking at the transaction from its view of the contract.

The questions here presented are certainly interesting, but at the last, no matter from what corner

they are approached, I am firm in the conviction that, positions reversed, any attempt by Morris Brothers, stopping where they did, to recover from the Hopkins Estate the purchase price of these bonds would have been futile, not to say impudent. And it does not need to be repeated that if one of the parties has the right to sue for the bonds as the title owner, then the other party will have the undoubted right to sue for the purchase money also upon the firm ground it had parted with title.

The petition is therefore disallowed.

Dated, October 18, 1921.

A. M. CANNON,
Referee in Bankruptcy. [60]

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition for review is hereby accepted in Multnomah County, Oregon, this day of October, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for claimant.

J. P. WINTER,
Attorney for Trustee in Bankruptcy.
Filed October 22, 1921. A. M. Cannon, Referee.
Filed October 26, 1921. G. H. Marsh, Clerk. [61]

AND AFTERWARDS, to wit, on the 14th day of November, 1921, there was duly filed in said court an order of the Court affirming the order of the Referee, and denying the petition of the trustees of the A. C. Hopkins Estate, in words and figures as follows, to wit: [62]

In the District Court of the United States for the District of Oregon.

No. B-5653.

November 14, 1921.

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt.

**Order of Court Affirming Order of Referee and
Denying Petition of Trustees of A. C. Hopkins
Estate.**

This cause having been heretofore on August 29, 1921, referred back to A. M. Cannon, Referee in Bankruptcy herein, for further hearing upon the petition of the trustees of the Estate of A. C. Hopkins for an order directing the trustee herein to deliver to them certain bonds described in said petition, and the order upon such further hearing denying said petition having been certified to the court for review, this cause was heard upon review of said order of said Referee in Bankruptcy, the said trustees of the Estate of A. C. Hopkins appearing by Mr. Charles A. Hart, of counsel, and the trustee of the estate of the above-named bankrupt

appearing by Mr. John P. Winter, of counsel: on consideration whereof, it is now ORDERED AND ADJUDGED that the order of the said Referee, denying the petition of the Trustees of the said Estate of A. C. Hopkins, be and the same hereby is affirmed, and it is further ORDERED that the petition of the trustees of said A. C. Hopkins Estate for the delivery to them by the Trustee of the estate of the above-named bankrupt of the bonds described in said petition be and the same hereby is denied.

R. S. BEAN,
Judge.

Filed November 14, 1921. G. H. Marsh, Clerk.
[63]

AND AFTERWARDS, to wit, on the 23d day of November, 1921, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [64]

In the District Court of the United States for the
District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the MATTER OF MORRIS BROTHERS, INC.,
a Corporation.

Petition for Appeal.

The petitioners, William P. Hopkins and I. A. Shaffer, Jr., trustees of the Estate of A. C. Hopkins, deceased, conceiving themselves agrieved by the judg-

ment and decree made and rendered in the above-entitled court in this cause, and entered therein on the 14th day of November, 1921, at the regular October, 1921, term of said court, in favor of the Trustee in Bankruptcy in the above-entitled proceeding and against the petitioners therein, wherein and whereby it was ordered and adjudged that that certain order of A. M. Cannon, Esquire, Referee in Bankruptcy, dated October 18, 1921, disallowing the claim of petitioners for the reclamation of certain bonds described in their petition theretofore filed, be affirmed, and ordered and adjudging that the petitioners' application and petition to reclaim from the Trustee in Bankruptcy certain bonds specifically listed in their said petition, be denied, do hereby appeal from said order, judgment, and decree thus entered November 14, 1921, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit; and the said petitioners file herewith their assignment of errors asserted and intended to be urged by them on this their appeal.

And the petitioners pray that this their petition for appeal and their said appeal may be granted and allowed, and that citation issue herein as provided by law, and that [65] an order be made fixing the amount of the bond to be given by petitioners upon appeal; and that a transcript of the record, proceedings, and papers upon which said order, judgment, and decree was made and entered, duly authenticated, may be sent to the United

States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

WILLIAM P. HOPKINS.

I. A. SHAFFER, Jr.,

Petitioners.

By CAREY & KERR,

CHARLES A. HART,

Their Attorneys.

The appeal prayed for in the foregoing petition is allowed as by order made this 23d day of November, 1921.

CHAS. E. WOLVERTON,

District Judge.

State of Oregon,

County of Multnomah,—ss.

Due service of the within petition for appeal is hereby accepted in Multnomah county, Oregon, this day of November, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for petitioners.

J. P. WINTER,

Attorney for Trustee in Bankruptcy.

Filed November 23, 1921. G. H. Marsh, Clerk.

[66]

AND AFTERWARDS, to wit, on the 23d day of November, 1921, there was duly filed in said court an assignment of errors on appeal, in words and figures as follows, to wit: [67]

In the District Court of the United States for the
District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the Matter of MORRIS BROTHERS, INC., a
Corporation, Bankrupt.

**Assignment of Errors Upon Appeal of William P.
Hopkins and I. A. Shaffer, Jr., Trustees.**

The petitioners, William P. Hopkins and I. A. Shaffer, Jr., above named, complain of the order, judgment, and decree made and entered in the above-entitled court in this cause as alleged in their petition for appeal therefrom, and in the prosecution of their said appeal, they will assert and rely upon the following assignment of errors:

I.

The District Court of the United States for the District of Oregon erred in affirming the order of Honorable A. M. Cannon, Referee in Bankruptcy, dated October 18, 1921, disallowing the reclamation petition of the petitioners for certain bonds listed in their said petition, and in ordering and adjudging that said order of the Referee in Bankruptcy be affirmed, and in ordering and adjudging that the petition of petitioners seeking to reclaim said bonds from the Trustee in Bankruptcy be denied.

WHEREFORE, these petitioners pray that said order, judgment, and decree so made and entered in favor of the Trustee in Bankruptcy and against petitioners be reversed and held for naught, and

that a judgment and decree be rendered and entered herein in favor of petitioners and against the Trustee in Bankruptcy as prayed for in the reclamation petition of the petitioners herein, and that [68] petitioners may have such other and further relief as may be in conformity with law and the practice of this court and as may be proper in the premises.

CAREY & KERR,
CHARLES A. HART,
Attorneys for Petitioners.

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignments of error is hereby accepted in Multnomah county, Oregon, this — day of November, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for petitioners.

J. P. WINTER,
Attorney for Trustee in Bankruptcy.

Filed November 23, 1921. G. H. Marsh, Clerk.
[69]

AND AFTERWARDS, to wit, on the 23d day of November, 1921, there was duly filed in said court an order of the Court allowing appeal, in words and figures as follows, to wit: [70]

In the District Court of the United States for the
District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the Matter of MORRIS BROTHERS, INC., a
Corporation, Bankrupt.

**Order Allowing Appeal of William P. Hopkins and
I. A. Shaffer, Jr., as Trustees.**

Now, on this 23d day of November, 1921, the above-entitled proceedings coming on regularly to be heard upon the petition of William P. Hopkins and I. A. Shaffer, Jr., Trustees, the above-named petitioners, praying that an appeal be allowed them herein from that certain order, judgment, and decree of this court made and entered herein November 14, 1921, and for the reversal of said order, judgment, and decree; and the said petitioners having filed herein and presented to this court their said petition and an assignment of errors relied upon and intended to be urged by them upon said appeal, and it appearing to the court that said petitioners are entitled to said appeal:

Now, therefore, on motion of Mr. Charles A. Hart, of counsel for petitioners:

IT IS ORDERED that the petition of said William P. Hopkins and I. A. Shaffer, Jr., for appeal from that certain order, judgment, and decree of this Court entered November 14, 1921, be and the same is hereby allowed; and

IT IS FURTHER ORDERED that the bond on said appeal be and the same is hereby fixed at the sum of five hundred dollars (\$500.00).

Dated, November 23, 1921.

CHAS. E. WOLVERTON,
District Judge.

Filed November 23, 1921. G. H. Marsh, Clerk.
[71]

AND AFTERWARDS, to wit, on the 23d day of November, 1921, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [72]

In the District Court of the United States for the
District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the Matter of MORRIS BROTHERS, INC., a
Corporation, Bankrupt.

**Bond on Appeal of William P. Hopkins and I. A.
Shaffer, Jr., Trustees.**

KNOW ALL MEN BY THESE PRESENTS,
That we, William P. Hopkins and I. A. Shaffer, Jr.,
Trustees, as principal, and American Surety Com-
pany of New York, as surety, are held and firmly
bound unto E. C. Bronaugh, Trustee in Bankruptcy
of Morris Brothers, Inc., in the full and just sum of
five hundred dollars (\$500.00), to be paid to the
said E. C. Bronaugh, Trustee in Bankruptcy, his

certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 23d day of November, 1921.

WHEREAS in the District Court of the United States for the District of Oregon, in a proceeding pending in said court between William P. Hopkins and I. A. Shaffer, Jr., Trustees under the last will and testament of A. C. Hopkins, Deceased, as petitioners, and E. C. Bronaugh, Trustee in Bankruptcy of Morris Brothers, Inc., as respondent, an order and decree was rendered against the said petitioners and the said petitioners having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said order and decree in the aforesaid suit, and a citation directed to the said E. C. Bronaugh, Trustee in [73] Bankruptcy, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from and after the date of the citation:

Now, the condition of the above obligation is such that if the said William P. Hopkins and I. A. Shaffer, Jr., Trustees, shall prosecute this appeal to effect and answer all damages and costs if they fail to make this appeal good, then the above obliga-

tion to be void; otherwise to remain in full force and effect.

WILLIAM P. HOPKINS,

I. A. SHAFFER, Jr.

By CAREY & KERR,

C. A. HART,

Their Attorneys.

AMERICAN SURETY COMPANY OF
NEW YORK.

By W. A. KING,

Resident Vice-president.

[Seal]

Attest: E. LIEMAN,

Resident Assistant Secretary.

W. A. KING,

Agent.

This bond is approved as to form, amount and sufficiency of surety this 23d day of November, 1921.

R. S. BEAN,

United States District Judge.

State of Oregon,

County of Multnomah,—ss.

Due service of the within bond on appeal is hereby accepted in Multnomah county, Oregon, this [74] 23d day of November, 1921, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for petitioners.

J. P. WINTER,

Attorney for Trustee in Bankruptcy.

Filed November 23, 1921. G. H. Marsh, Clerk.

[75]

AND AFTERWARDS, to wit, on the 23d day of November, 1921, there was duly filed in said court a praecipe for transcript of record on appeal, in words and figures as follows, to wit:
[76]

In the District Court of the United States for the
District of Oregon.

IN BANKRUPTCY—No. B-5653.

In the Matter of **MORRIS BROTHERS, INC.**, a
Corporation, Bankrupt.

**Praecipe for Transcript of Record on Appeal of
William P. Hopkins and I. A. Shaffer, Jr.,
Trustees.**

To the Clerk of the District Court of the United
States for the District of Oregon:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to an appeal duly taken and allowed in the above-entitled cause, and to include in such transcript the following:

1. Certificate and return of Honorable A. M. Cannon, Referee in Bankruptcy, dated July 19, 1921, including reclamation petition, answer of Trustee in Bankruptcy, stipulation, order disallowing petition, petition for review, transcript of testimony, and exhibits.

2. Order and decree of the District Court made and entered August 8, 1921, affirming order of the

Referee in Bankruptcy and denying reclamation petition.

3. Opinion of District Court accompanying order affirming Referee's order.

4. Petition for rehearing filed August 17, 1921.

5. Order of District Court vacating order of August 8, 1921, and referring reclamation petition back to Referee in Bankruptcy for the introduction of additional testimony and rehearing. [77]

6. Certificate of Referee in Bankruptcy dated October 26, 1921, including order disallowing reclamation petition for review, transcript of supplementary testimony, and exhibits.

7. Order of the District Court made and entered November 14, 1921, affirming order of Referee in Bankruptcy and disallowing reclamation petition.

8. Certificate of clerk of transcript of record on appeal.

CAREY & KERR,
C. A. HART,
Attorneys for Appellants.

Filed November 23, 1921. G. H. Marsh, Clerk.
[78]

AND AFTERWARDS, to wit, on the 29th day of July, 1921, there was received from the Referee in Bankruptcy and duly filed in said court testimony and exhibits, in words and figures as follows, to wit: [79]

In the District Court of the United States for the District of Oregon.

B-5653.

In the Matter of Estate of MORRIS BROTHERS, INC., in Bankruptcy.

Testimony.

Portland, Oregon, April 1, 1921.

Hearing on the application in reclamation of William P. Hopkins and I. A. Shaffer, Jr., trustees of the estate of A. C. Hopkins, before Honorable Anderson M. Cannon, Referee in Bankruptcy.

Mr. C. A. Hart appeared for the estate of A. C. Hopkins.

Mr. John M. Winter and Mr. Marion Dolph appear for the Trustee in Bankruptcy.

Mr. HART.—This is a hearing on the application and petition of the Estate of A. C. Hopkins, William P. Hopkins and I. A. Shaffer, Jr., for the delivery to them of certain specified bonds purchased from Morris Brothers, Inc., before the adjudication. The question is that the bonds were paid for but not actually delivered to the Hopkins Estate, and the question for determination is whether or not at the

time of the adjudication these bonds belonged to the Hopkins Estate; that is whether the title had not passed at the time of the adjudication. The petition gives a list of the bonds. I will not read the petition, but they make up a total of \$60,000 worth of securities. The facts [80] are not in dispute, but as to \$10,000 Bay City bonds I am now informed that they were identified and never secured by Morris Brothers. I knew that they were not in just the same situation as the other fifty thousand dollars worth, but I did not know what the facts were. Mr. Dolph tells me, in point of fact, they were never secured by Morris Brothers, and if so I don't see that there is any claim to be made by the Hopkins Estate as to that \$10,000 other than a claim as a general creditor. As to the other \$50,000, here is the transaction: On December 9th, 1920, Mr. William P. Hopkins of Spokane, one of the two trustees of the Hopkins Estate, came to Portland and spent most of the day, or part of the day with Mr. Fred Glenn, then a vice president of the Morris Brothers, Inc. and made a purchase or contract of purchase with Mr. Glenn for \$60,000 worth of bonds selecting the particular bonds as outlined in the petition. The purchase was made subject to the approval of Mr. I. A. Shaffer, a co-trustee with Mr. Hopkins of the Hopkins Estate. The next day a letter was written to Mr. Shaffer, the original of which I have in my files, giving a list of the bonds. Subsequently Mr. Shaffer wrote to Morris Brothers from Lockhaven, Pa., to Morris

Brothers, the date of that letter being December 16th, acknowledging Mr. Glenn's letter, closing his letter with the statement: "You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins." Five days later and on December 20th Mr. Hopkins, of Spokane, [81] wrote to Morris Brothers, Inc., enclosing his check as trustee of the Hopkins Estate for \$61,000 to apply on the purchase of the bonds. He stated in his letter that he desired Morris Brothers to send him a statement of the account and that if there was any considerable amount due them he would send another check, asking them to send the securities to Lockhaven with a check for the balance due the estate out of the amount of the check he enclosed. (Mr. Hart thereupon read the letter of Mr. Shaffer and of Mr. Hopkins to Morris Brothers.)

I am informed that at once upon receipt of this letter with the check the bonds were gotten together in a package made up ready for delivery. What I should have said was that after the contract for the purchase was made for the specific bonds the bonds were procured from San Francisco or other places where they were pledged, or otherwise, and sent to the Portland office for the purpose of being used in the consummation of this sale to the Hopkins estate, and prior to and before the check for \$61,000 was received by Morris Brothers, Inc., they had been received here in Portland and were actually assembled. I do not know whether any charge was made.

One statement has been made to me that there was a charge or a credit on Morris Brothers' books showing that these particular bonds were set aside for the Hopkins Estate. I am also informed that the matter went so far as the preparation of a letter [82] transmitting the bonds to Mr. Shaffer. Mr. Dolph or Mr. Winter can give us that information.

Mr. DOLPH.—We have the letter I think.

Mr. HART.—At any rate it is our contention that this was a sale of specific personal property which was in fact identified and set aside and appropriated to the purchaser and that because of that fact the title to these particular bonds which were so identified actually passed to the Hopkins estate and became the property of the Hopkins Estate and were its property at the time of this adjudication. That raises the question as to when the title passed and it is on that question that I have assembled one or two authorities. If the title to this particular property had actually passed prior to the adjudication then the bonds are the property of the Hopkins estate, and we are concerned solely with the question of whether or not the title had passed.

The authorities cited by Mr. Hart were:

Harris vs. Egger, 226 Fed. 389, particularly at page 395, and the case of Hatch, 100 Supreme Court, 124.

After some further argument and talk out of the record, the following witnesses were sworn and examined: [83]

Testimony of Miss Alice Agler, for Claimant.

MISS ALICE AGLER, called as a witness and sworn, was examined and testified as follows:

(Examination by Mr. HART.)

Q. You were occupying what position for Morris Brothers, Inc., at the time of and just prior to the adjudication in bankruptcy?

A. Secretary to Mr. Etheridge.

Q. Are you familiar with the circumstances concerning the purchase by the Hopkins Estate of the bonds listed in the petition by the Hopkins Estate?

A. Well, to a certain degree I am. I know when the order was taken by Mr. Glenn on the 9th of December; the bonds were not delivered at that time and I don't know whether they were all here or not at that time.

Q. I understand from a statement made by Mr. Dolph that \$10,000 of that lot, the Bay City bonds, were not secured at any time?

A. They were to be the same bonds, the same 1934 maturity; I believe they would be in that.

Q. Then all the rest of the bonds, the Idaho School and the Highway District bonds of the different counties in Idaho, all that remained of the \$50,000, they were in San Francisco at the time Mr. Glenn took the order, were they not?

A. On December 9th?

Q. Yes. A. I can't say as to that. [84]

Q. Were they assembled after the Hopkins Estate paid for them?

(Testimony of Miss Alice Agler.)

A. I know on the 24th of December there were quite a bunch of them assembled.

Q. They were all there with the exception of the \$10,000 Bay City's? A. Yes.

Q. Who assembled them?

A. I believe Mr. Taylor counted them out. Mr. Taylor was our collateral clerk.

Q. What did he do with them?

A. They were bunched together and fastened together in some way with this little slip put on them with the name of the purchaser on them.

Q. What was on the slip, do you know?

A. I presume the name of the Hopkins Estate.

Q. What I am getting at, what were they trying to do when they assembled these bonds—were they getting them ready to deliver to the Hopkins Estate? A. Yes, that is what I would say.

Q. They were actually counted out and put together in one package and marked in some way intending to be sent to the Hopkins Estate on account of its purchase?

A. Yes, that is what I would say.

Q. All except the \$10,000 Bay City's?

A. Yes.

Q. Do you know if anything else was done at that time by anyone else towards sending the bonds to the Hopkins Estate?

A. Yes, there was prepared a letter— [85]

Q. Written by whom?

A. By the building department.

(Testimony of Miss Alice Agler.)

Q. What does the billing department have to do with the delivery of bonds?

A. When the bonds are ready for delivery they simply write the shipment letter.

Q. Do you think that kind of a letter was actually written? A. Well, yes, I would think so.

Q. Payment had previously been made for the bonds? A. Yes.

Q. Hopkins estate had paid something like \$61,000 to Morris Brothers for the bonds?

A. Yes.

Q. Do you recall whether there was some balance due? A. There was a small balance due.

Q. And was a bill made out showing that?

A. Yes, that would be sent back with the letter and the bonds.

(Examination by Mr. WINTER.)

Q. When you segregated these bonds for the purpose of sending them to the Hopkins Estate, or their agent, do you know whether it was the intention down there to send a part of the bonds before they had all of them?

A. Well, I don't know. Mr. Taylor seems to think they might have tried to substitute the 32's later, if they did not have the 34's—there might have been something to that effect.

Q. Have you a copy of the original order for those bonds? A. Yes. [86]

Q. Is that here?

A. Yes, I gave it to Mr. Dolph.

Q. Do you know how the order was taken,

(Testimony of Miss Alice Agler.)

whether it was taken through the mail or given by some one in person?

A. No, I think it was in person; Mr. Glenn took it.

Q. Was not the agent of the Hopkins Estate in Portland at the time the purchase was made?

A. Yes.

Q. Have you got the order here?

A. Yes, this is the original order. (Hands order to counsel.)

Q. Will you take it and look at it. In whose handwriting is that order? A. Mr. Glenn's.

Q. By whom is it signed?

A. Mr. Glenn wrote it and he signed it.

Q. Did you have any order or anything that was signed by the Hopkins Estate or entry in behalf of the Hopkins Estate? A. No.

Q. Can you tell from your records when payment was made?

A. Yes, it was made two or three days before the adjudication; it was received in our office about the 22d of December.

Q. Was there a letter transmitting the check in payment?

A. I cannot tell you because I could not find it.

Q. Did you look for it? A. I did.

Mr. HART.—I have a copy of the letter.

A. We looked through our records to-day for it and could not find the original letter. [87]

Q. Did you ever see the original letter?

(Testimony of Miss Alice Agler.)

A. I suppose I did. I open all the mail, but I do not remember much about it.

Q. Do you know whether the paper I hand you dated December 20, 1920, with the heading 215 Jones Building, Spokane, Washington, whether that is a copy of the original letter?

A. I can't tell that because I don't remember anything about it?

Q. You don't remember anything about the letter? A. No.

Mr. HART.—That copy was sent in by Mr. Hopkins of Spokane; he copied his own carbon copy. I wrote Mr. Hopkins on December 30th asking him to furnish me with a complete copy of his file.

Q. (Mr. WINTER.) Do you know how this transaction was entered upon your books, the books of Morris Brothers?

A. I imagine in the ordinary way. When that order came in on the 9th it would be immediately taken to the collateral clerk and he would make his entries accordingly and these bonds could not be touched for anyone else until they were billed out.

Q. Do you know whether at the time the order was taken whether Morris Brothers had the bonds in its possession?

A. Yes, and they order some of the bonds from Seattle, ordered them to be sent down here; whether they were all in out stock in Portland or at the bank, at some bank as collateral, I could not say, but we got them together.

Q. Do you know whether Morris Brothers had

(Testimony of Miss Alice Agler.)

the actual amount specified in this order of these particular bonds? [88]

A. I believe they would have more on some of the Idahos.

Q. Can you tell where these particular bonds were at the time?

A. Yes, I can find out. I think that can be traced back through the records.

Mr. HART.—Find where they came from and when they were sold? A. Yes.

Q. (Mr. WINTER.) Do you know whether any of these bonds were sold by Morris Brothers on interim certificates issued outside?

A. I could not tell that without looking at the records.

Q. Have you examined the final report made by the accountants sufficiently so you could tell me now whether you could determine that matter if you had that report before you?

A. Yes, but it would take a little while to do it, I think, but I could do it.

Q. Who at Morris Brothers had this matter in charge so he or she would know?

A. Mr. Taylor is the collateral clerk.

Q. And he could tell? A. I think he could.

Mr. WINTER.—My judgment is that if this is a copy of your letter that it was not a completed sale. I would like to go into this matter further and find out more about it. I would like to have Mr. Taylor come over and see what he has to say about it.

(Testimony of Miss Alice Agler.)

Mr. HART.—I think we ought to have all the facts, of course. [89]

Mr. WINTER.—The question is who owned the title to the property, of course. If the title passed and the property was yours and if the bonds had been destroyed it would have been your loss. In this particular instance you sent us \$61,000 for some bonds.

Mr. HART.—Specifying the property that we were purchasing. I would like to introduce a letter from Mr. Fred Glenn to Mr. Schafer, one of the trustees of the Hopkins Estate, dated December 10th.

The same was received and marked Claimant's Exhibit No. 1.

Mr. HART.—And also the copy of a letter dated December 15th from I. A. Schafer, Jr., to Morris Brothers, Inc.

The said letter was received and marked Claimant's Exhibit No. 2.

Mr. HART.—And also a letter from William P. Hopkins to Morris Brothers, Inc., dated December 20, 1920.

The said letter was received and marked Claimant's Exhibit No. 3.

Mr. HART.—Let us stipulate also, without encumbering the record, that Mr. Glenn in writing to Mr. Schafer sent copies of the opinions of Teal, Minor & Winfree as to each of the bond issues. I have copies of the opinions here if you care to see them or they can be put into the record. I do not

(Testimony of A. L. Taylor.)

want to unnecessarily encumber [90] the record, but I do want it to be clear that there was a separate legal opinion as to each one of these issues forwarded by Mr. Glenn to Mr. Schaffer with his letter of December 10th.

Mr. WINTER.—That is satisfactory. I guess there is no question about that.

Mr. CANNON.—No, I think there is no question about that.

Mr. WINTER.—Mr. Taylor is here now and Miss Agler may be excused for a few minutes and we will see what he has to say. [91]

Testimony of A. L. Taylor, for Claimant.

Mr. A. L. TAYLOR, called as a witness and sworn, was examined and testified as follows:

(Examination by Mr. HART.)

Q. You held the position of collateral clerk for Morris Brothers prior to their adjudication in bankruptcy? A. Yes.

Q. What did you have to do with the sale and delivery of bonds in that position?

A. When the bond orders came in I saw to it they *they* were reserved and also I filled any orders that were ready for delivery at the time.

Q. How did you fill them?

A. By obtaining the bonds that were in stock and filling the orders with them.

Q. That is of actually making the bonds up in a package or in an enclosure of some kind and mail-

(Testimony of A. L. Taylor.)

ing them out, or sending them out otherwise, shipping them? A. Yes.

Q. Do you remember the purchase of some bonds by the Hopkins Estate in December? A. I do.

Q. That was an order for \$60,000 of Idaho School District and Highway bonds and some Bay City bonds? A. Yes.

Q. Can you tell us just what you did—what took place with reference to that purchase prior to the bankruptcy? A. Yes.

Q. Go ahead and tell about it.

A. The order came in, as I recall, about the first of December, along towards the first of the month, first week [92] of December, and delivery of the bonds was to be made some time thereafter. The order was examined and some of the bonds that were to be used in making up this order were hypothecated with various banks and we had to get these bonds back into our office, and we had got them all together except the Bay City, ready for delivery on December 24th.

Mr. WINTER—What was that date?

A. December 24th.

Q. You had all the bonds in then except the Bay Citys?

A. Yes; they were all assembled and were ready for delivery and had been put aside with Hopkins' name on them.

Q. Where were they kept?

A. They were kept along with my other bonds

(Testimony of A. L. Taylor.)

in stock, but they were segregated, set aside for them.

Q. Were you getting ready to send them out?

A. Yes.

Q. Were you intending to send them on without waiting for the Bay City's?

A. Yes, that was the intention.

Q. You expected to get the Bay City bonds a little later?

A. Yes and complete the order when the Bay City bonds arrived.

(Examination by Mr. WINTER.)

Q. Did you have any arrangement whereby you were going to get the Bay City bonds at all?

A. I am sure we had a contract with the Bay City for the bonds to be delivered later, but I am not positive.

Q. Could you ascertain that fact by going through your records? [93]

A. I think that can be ascertained, yes, sir.

Q. The Port of Bay City didn't issue any bonds that had the maturity the bonds ordered were supposed to have.

Mr. Glenn's letter was introduced in evidence and the same was received and marked Plaintiff's Exhibit No. 1.

Q. What do you know about the issue Mr. Taylor; was there an issue that corresponded to the order as to maturity?

A. That I would not be positive of, Mr. Winter.

(Testimony of A. L. Taylor.)

I am inclined to think there was an issue of 1934's. That can be ascertained.

Q. Were all the bonds that you have referred to as having been segregated; were all those bonds up as collateral at the time the order was taken?

A. Part of them were but I don't think they all were.

Q. Do you know whether any interim certificates were standing out against any of the bonds described in the letter of December 10th?

A. You mean any of these bonds in this letter?

Q. Yes, or in that class?

A. They were not to the best of my knowledge.

Q. Who at Morris Brothers would know of that absolutely?

A. The Bay City, do you mean?

Q. Of any of these bonds described in there, any other of the bonds described in there, whether any interim certificates were standing out for any of them?

A. That could be ascertained by looking up the interim certificate register. [94]

Q. Could you ascertain that if you had before you the report of the accountant?

A. If I had the complete report I could; I mean the report embracing the interim certificates outstanding.

Q. Is the report filed with the final report of the receiver, is that complete?

A. I have not seen the final report.

(Testimony of A. L. Taylor.)

Q. I believe Judge Bronaugh has a copy of that report? A. He may have.

Q. Does that not include all the interim certificates outstanding?

A. I expect it does. I have not looked through it. It should. I could look that up and see.

Q. I wish you would do that.

After a short interval, Mr. Taylor reported that he had looked up the matter inquired about and the following question was asked by Mr. Winter:

Q. Have you found out about the interim certificates?

A. Yes. No interims were against any of these bonds. They were absolutely free and ready for delivery.

Mr. Taylor was excused for the present.

He was recalled later. [95]

Testimony of Fred Glenn, for Claimant.

Mr. FRED GLENN, called as a witness and sworn, was examined and testified as follows:

(Examination by Mr. HART.)

Q. You were vice-president of Morris Brothers, Incorporated, prior to the adjudication in bankruptcy, were you not?

A. I held that position.

Q. You were the representative of Morris Brothers who negotiated a sale of some bonds to the Hopkins Estate amounting to something like \$60,000?

A. I was.

(Testimony of Fred Glenn.)

Q. Were you the author of this letter which is marked Claimant's Exhibit One? A. Yes.

Q. When you negotiated this sale with Mr. William Hopkins, one of the trustees of the estate, what was said, if anything was said, regarding this entire purchase, and as to whether or not it was a purchase of separate bonds, or was it a sale of certain list of bonds which if he took any he would have to take all; or what was said about that, if anything?

A. I don't recall anything like that; no, sir.

Q. What was the transaction as you recall it?

A. I think it is set forth in that letter. I would like to see that letter just to refresh my memory. (Letter was handed to witness.)

Q. Was there a blanket price made for the whole lot of bonds or was a different price set for each separate kind of bonds?

A. Each had its own price.

Q. You took each particular lot of these Idahos, and others, he selected what he wanted and you made him a price? [96]

A. Yes. Each bond or lot had its own price.

Q. Was there any reduction of the prices of any of them in consideration of his agreeing to take the \$60,000 worth of bonds?

A. Not to my knowledge.

(Examination by Mr. WINTER.)

Q. Was it your custom over there that if a person bought \$50,000 worth of bonds that you would sell them at a reduced price?

(Testimony of Fred Glenn.)

A. Not to my knowledge. I don't believe any special concessions were offered.

Q. Was it a general custom where a man bought as much as \$50,000 that you would sell at a less rate than if he only bought \$10,000 worth?

A. That would be owing to the customer. Some special concessions might be made to insurance companies; they might get an inside price, or banks or other bond houses. In this particular instance it was an estate and so far as I could say the estate would not be entitled to any concessions.

Q. Do you know what the usual price was for which these bonds were sold?

A. I think in this sale we sold them at list prices. I am sure they were all sold at list prices.

Q. What do you mean?

A. The circular price. The prices as stated on our circulars. I believe they were all sold at list prices.

Q. You say you "believe" do you know to be a fact?

A. I would not know it unless I looked up the circular again. It is my recollection there was no special concession discussed with Mr. Hopkins.

Q. At the time this order was taken and at the time you [97] had the negotiations with Mr. Hopkins and took the order for the bonds, a part of the bonds being the Bay City bonds to the extent of \$10,000 due 1934 at a price to net the estate 6½%; did you have these particular bonds on hand at that time?

(Testimony of Fred Glenn.)

A. I would not have a knowledge as to whether they were on hand or not.

Q. You took the order? A. Yes.

Q. Do you know whether you had a contract to buy these particular bonds?

A. I think the contract existed, yes, sir.

Q. You think it existed?

A. To the best of my knowledge and belief it existed.

Q. Did you sell bonds and take orders for them without knowing whether you had them or could get them?

A. Well, these were the only bonds that I ever sold for Morris Brothers. That was the only order I ever took. In other words my business was not that of selling bonds.

Q. How did it happen you took this order?

A. Well, Mr. Hopkins asked a good many technical questions, and his letters were from time to time turned over to me and I endeavored to answer them to the best of my ability. A lot of our people were not qualified as well as I was to answer these questions intelligently and for that reason all this correspondence passed through my hands and when Mr. Hopkins came to town he was referred to me.

Q. Do you remember what Mr. Hopkins said at the time you took this order? [98]

A. We simply went over each issue; in other words, I had a book of circulars describing each of the issues in question. I had an old book as I remember it, of printed bulletins—I guess you'd

(Testimony of Fred Glenn.)

call them bulletins, and he selected several issues of school bonds.

Q. What did he say as to the amount of bonds that he wanted?

A. He didn't state how many he expected to buy. He merely said he would take \$10,000 of this and \$10,000 of this, and he gave me that order as I have made it out in the course of about fifteen minutes.

(Examination by Mr. DOLPH.)

Q. Do you know Mr. Shute, one of your salesmen? A. Yes, I think so.

Q. Didn't he first take up the sale of these bonds with the Hopkins Estate?

A. Not to my knowledge.

Q. If he told me he had, he might have taken the matter up with them and then the matter was referred to you?

A. He might have. I don't know who, or if anyone, talked to Mr. Hopkins prior to my talking to him.

Q. Do you think he was perhaps referred to you because of the technical questions you spoke about and that somebody else had paved the way?

A. I had spent the day with him, going out to Multnomah County Drainage District. Mr. Shute went along but he did not attempt to sell him any bonds on that trip; that I know.

Q. Mr. Shute told me something about a big sale he had made to the Hopkins estate, and that in con-

(Testimony of Fred Glenn.)

nection with some deal with the Western Bond and Mortgage Company. [99]

A. Mr. Shute drove the automobile and I went along.

Q. Do you know whether or not the Bay City bonds mentioned in your letter dated December 10, 1920, whether these particular bonds ever came into the possession of Morris Brothers, Incorporated?

A. I have no knowledge whether they did or not. I might state for the benefit of those present that it was my understanding that the bonds were all billed out.

Witness excused. [100]

Testimony of George T. Washington, for Claimant.

Mr. GEORGE T. WASHINGTON, called as a witness and sworn, was examined and testified as follows:

(Questions by Mr. HART.)

Q. You were one of the auditors engaged in the work of going over the Morris Brothers accounts under Mr. Whitcomb, the temporary receiver?

A. I was.

Q. Will you give us what explanation you can with reference to the listing of the general assets and especially with reference to the item of \$50,000 worth of bonds purchased by the Hopkins Estate from Morris Brothers in December, 1920?

A. Generally I examined all the bonds on hand in Morris Brothers, that being the first work I took

(Testimony of George T. Washington.)

up. I do not recollect any specific bonds for Hopkins Estate, or whatever the name was. This is the first time I ever heard of any such bonds belonging to Hopkins. In determining the liabilities of the company for bonds that may have been or not have been paid for, I analyzed all the accounts payable expecting to pick up any liability for bonds that were not paid for. I found no liability—I am certain I found no such account as that.

Q. These bonds were paid for and were done up ready for delivery and the testimony here indicates that they were made up in a package, or were assembled and ready for delivery at the time of the bankruptcy, and that when you took hold they were turned over to you in one lot or package. Do you recall that? [101]

A. I can positively say that there was no such package handed to me which contained any mark of any kind that would indicate they were not the bonds of Morris Brothers.

Q. Did you see a letter written to Mr. Whitcomb, the temporary receiver, signed by Charles A. Hart on the Carey and Kerr letter-head?

A. No, that was not handed to me and it was never called to my attention. I never heard of it. If I had, naturally it would have been one of the things that I would have gone into very carefully. Every effort was made to distinguish and keep apart the assets of Morris Brothers and those they

(Testimony of A. L. Taylor.)

held in trust. I would like to have Mr. Taylor tell what he knows about that.

Testimony of A. L. Taylor, for Claimant (Recalled)

Mr. A. L. TAYLOR, was recalled, and questioned by Mr. HART, as follows:

Q. Mr. Taylor, in what condition were these \$50,000 of bonds covered by the Hopkins purchase at the time of the bankruptcy?

A. They had all been assembled and they were set aside, segregated from the other bonds and placed separately with an elastic band around them and the name of A. C. Hopkins written across the end in led pencil on a piece of paper and that paper placed under the rubber band to indicate that they were the Hopkins Estate bonds.

(Questions by Mr. WINTER.)

Where were they kept?

A. They were kept in a drawer, or rather in this sliding arrangement separate from the other bonds. [102]

Q. Were there any other bonds in this slide excepting these particular bonds?

A. Yes, some Japanese Government bonds and some Liberty bonds and I think some U. K. bonds.

Q. Had the Japanese bonds been purchased by anybody?

A. We had purchased them for a certain individual, a Japanese, whose name I have forgotten.

Q. Purchased on interim certificates?

(Testimony of A. L. Taylor.)

A. No; we had bought them on the market.

Q. Were these Japanese bonds on hand at the time of the bankruptcy? A. Yes.

Q. How were they separated; was there a band around them and were they marked?

A. No, they were not marked, but they were in a small compartment, the same one with the Hopkins bonds.

Q. Do you know how they are reported in the auditor's report?

A. I believe under general assets.

Q. And these Liberty bonds you spoke of did they belong to any particular person?

A. I think they did. I really can't say positively.

Q. When were these particular bonds which you claim belong to the Hopkins Estate embraced in their purchase, when were they secured and assembled?

A. The segregation commenced, I think, about the 12th of December, somewhere about that time. Some of them were hypothecated at various banks and they had to be brought in. Some were in Seattle, and some, I think, were at the U. S. National Bank, and so on, and we exchanged other bonds for them and brought them in to fill the Hopkins order, and the segregation [103] commenced about the 12th of December and continued from day to day up to the 20th of December when we had them all in except the Bay City.

Q. As I understand that, as you got in a part of

(Testimony of A. L. Taylor.)

the bonds covered by the Hopkins order you segregated them or assembled them together.

A. Yes, into a separate segregation, apart from the other bonds.

Q. And when you started to so segregate them it was your purpose or intention after you had them all segregated or assembled to notify the Hopkins Estate that you were shipping them out?

A. Yes.

Q. You did not at the time have any intention of shipping them until you had them all segregated?

A. We intended to have them all segregated and ship them all at once.

Q. And that is the reason why they had not been shipped on the 24th of December? A. Yes.

Q. (Mr. HART.) They were not paid for until the 24th?

A. The check came in between the 21st and 24th.

Q. (Mr. WINTER.) Did you start to segregate them before they were paid for?

A. Yes, just as soon as we got the order.

(Excused for the present.) [104]

**Testimony of George T. Washington, for Claimant.
(Recalled).**

Mr. GEORGE T. WASHINGTON, recalled for further examination.

Mr. HART.—I offer in evidence a letter dated January 5th, 1921, addressed to W. D. Whitecomb,

(Testimony of George T. Washington.)

receiver of Morris Brothers, Inc., signed by Carey & Kerr, and written by myself.

The same was received and marked Claimant's Exhibit No. 4.

Mr. HART.—I wrote that letter on the suggestion of Mr. Whitcomb so he might have it before him as a matter of record.

Mr. CANNON.—Evidently they overlooked it.

Mr. HART.—I also offer in evidence a letter acknowledging receipt of the letter marked Claimant's Exhibit No. 4, written by Mr. Whitcomb and dated January 6, 1921.

The same was received and marked Claimant's Exhibit No. 5.

Q. While ago I think you started to tell where these bonds were and why they were listed as general assets of Morris Brothers; do you want to continue that statement?

A. I would like to continue what I had to say in this way; the only thing I want to say, if these bonds were in with the other bonds of Morris Brothers, naturally it was to be assumed they were the property of Morris Brothers and that was the understanding I had from Mr. Taylor of all the bonds contained in their files. Apart from these general files of Morris Brothers there was what they termed the black can in which the segregated bonds for delivery were placed. I simply take this position, that if the bonds were in this general file they [105] belonged to Morris Brothers. I do not recall any

(Testimony of George T. Washington.)

bonds marked specially for any certain individual or estate. Had I seen them, naturally I would have inquired into them. I just assumed from the fact that they were not segregated that they all belonged to Morris Brothers and were not held by them for any one, and because they were in there I feel that I was justified in taking it for granted that they were the property of Morris Brothers. The letters that passed between you and Mr. Whitcomb I did not see, if I had I would have gone into the matter most certainly.

Q. Would you then have undertaken to have set the bonds aside?

A. I certainly would have gone into the matter. I went over all their securities of every description. (Examination by Mr. WINTER.)

Q. If these bonds had been labeled in any way with a rubber band around them and marked as if they belonged to some particular person, would not that matter have attracted your attention?

A. It certainly would have.

Q. And would not that have caused you to make inquiry as to whether they were the property of Morris Brothers? A. It would have.

Q. Or whether it was trust property, or otherwise, before you made your report?

A. It would; yes sir.

Q. Do you remember this particular bunch of bonds? A. No, sir. [106]

(Testimony of George T. Washington.)

Q. Have you any recollection at all in regard to them? A. No, sir.

Q. When did you begin to examine these bonds?

A. On the evening of December 24th. That was my particular work and I was the first one who went into the securities and made a list of them. That was my first work there.

Q. Will you tell where you found these bonds?

Mr. HART.—He has just said he did not remember them.

A. If you want a detailed description of the manner in which I examined the securities presumed to be the property of Morris Brothers, I would be glad to give it to you. The securities presumed to be the property of Morris Brothers were contained in the general files and in a general bond cabinet. Mr. Taylor and I first examined that cabinet and listed the bonds and rechecking them outside to see that we had all the securities contained in there. Later in the night we took up the securities that were on hand in various places, in tin boxes and in the cashier's cages, and proceeded to list and check them in the same manner. About one or two days afterwards, after I had concluded that we had found all the bonds, we found what they called their black box, and these were not listed until Monday or Tuesday following.

Q. What did you find in the black box?

A. Bonds segregated for delivery under various conditions.

(Testimony of George T. Washington.)

Mr. HART.—Against which interims were outstanding.

No answer.

Q. Could you refer to the schedule here and indicate the bonds that were in the black box?

A. Mostly the bonds in the black box were segregated for delivery, and it contained, as shown there, bonds on which [107] interims are outstanding or segregated for delivery and set aside against specifically prescribed interim certificates. In addition to that there were other bonds of the company in that same box that were segregated for delivery. These particular bonds in question were not in this box I do not recollect them at all. Mr. Taylor just referred to the bond files where the bonds were and none were segregated at all.

Q. You have no independent recollection in regard to these bonds for the Hopkins estate?

A. No, sir; none whatever.

Q. Do you think you could refresh your memory in any way—by your work sheets, for instance?

A. I could possibly.

Q. Will you look at the final report—I do not know whether it can be done, or not—and tell how the report shows the money that the Hopkins Estate paid for the bonds is recorded?

A. It would not be shown there.

Q. Would not they have credit for that money?

A. No, sir, it would be contained in the general

(Testimony of George T. Washington.)

cash account appearing in the books of the company, and perhaps in the bank deposit books.

Q. How could we examine that final report and ascertain how much money was paid by the Hopkins Estate for bonds?

A. That could not be ascertained from the report, for the money had been paid in already and entered in the general cash.

Q. When the check for \$61,000 was paid to Morris Brothers would not the books of Morris Brothers credit the Hopkins Estate with \$61,000?

A. Yes. [108]

Q. Would not that report show that?

A. No, sir, that was a closed transaction.

Q. It was closed?

A. Yes, it was a closed transaction to the extent that Hopkins would have received credit for the \$61,000.

Q. Then your report would show that Hopkins got credit for \$61,000?

A. No, and I do not remember any credit for any such an amount.

Q. The final result would be if your report does not show that they are general creditors would be that there are that many less assets in the bankrupt estate of Morris Brothers; the assets of the estate would be reduced; that is the point I am trying to bring out. If they were the property of Morris Brothers then the books or your report should show

(Testimony of George T. Washington.)

that Morris Brothers owed the Hopkins Estate that much money?

A. It was a closed account as far as the books were concerned.

Q. If the assets are going to be reduced by this amount we want to find it out. We don't know but what there are other instances like this. We are depending on your report to show that.

A. If there are any such cases as this developed all I can say is that their method of keeping their records did not disclose it.

Q. As I understand your report, it does not show that Morris Brothers was indebted to the Hopkins Estate to the extent of \$61,000 or that the Hopkins Estate had that many bonds coming to it?

A. No, it does not disclose that. These bonds were in the [109] general files of Morris Brothers.

Mr. CANNON.—We understand that. It is not a question of criticising your work. Here is the ledger account which shows that this \$61,000 was received and what it was received for no doubt, but the bonds not being segregated, I can understand how Mr. Withington could assume that Hopkins Estate had its bonds and that the transaction was closed.

Witness excused. [110]

Testimony of A. L. Taylor, for Claimant (Recalled).

Mr. A. L. TAYLOR, recalled by Mr. HART.

Q. You have heard the testimony of Mr. Withington to the effect that he has no recollection of seeing these Hopkins bonds set apart in any way and that they were in the general files and not in the so-called black box, or the box which contained the segregated bonds?

A. The reason they were not in there is because there was not room for them.

Q. Was it your intention to put them there?

A. No, because there was not room in that box for this large bundle of bonds.

Q. Was that where they belonged?

A. Yes, ordinarily they would have been placed in there, but as a matter of fact I understood these bonds were going out that day, December 24th; they were billed out and I supposed they were going out. As a matter of convenience and because there was not room for them in the other box they were placed by me down at the bottom of the file just for the time being and until they were sent out. They were placed there solely because the package was too large to put it in the other place.

Q. Do you have any recollection of calling Mr. Withington's attention to the bonds that did not belong to the Company?

A. Yes, I have a very vivid recollection of calling his attention to them.

(Testimony of A. L. Taylor.)

Q. In what way?

A. The bonds in this package were rather bulky to handle, as I say, and they had a rubber band around them with the name on them written on a piece of paper, and when Mr. [111] Withington took the bonds over from me, these bonds were in the bottom of the file and I called his attention to them; I remember calling his attention to the fact that these bonds were for the Hopkins Estate when he was listing the general assets of the company. I remember calling his attention to the fact that this package of bonds belonged to the Hopkins Estate at that time.

Q. Fred Morris had taken charge of Morris Brothers at that particular time? A. Yes.

Q. Mr. Etheridge had left the city? A. Yes.

Q. (Mr. DOLPH.) How was it you got ready to deliver these particular bonds to the Hopkins Estate on the 24th of December when you did not have all of them; you did not have the Bay City bonds which were a part of the order?

A. Well, I think the order stipulated that the Bay City's were to be delivered at a later date.

Q. You intended to deliver these bonds notwithstanding the fact that you did not have all the bonds covered by the order?

A. I was going to deliver what we had and the Bay City's later and we were writing a letter to explain the matter.

Q. Did you write a letter of explanation?

(Testimony of A. L. Taylor.)

A. I don't know whether it went out or not.

Q. Was one prepared?

A. I think one was prepared. I did not prepare it.

Q. Did you know anything about the letter that was written to William P. Hopkins by Mr. Etheridge on December 22, 1920? [112]

A. Yes, I knew there was a letter written.

Q. Did you dictate that letter?

A. No, I did not.

Q. Did you direct it to be dictated? A. No.

Q. That was handled by Mr. Etheridge in person? A. Not according to this.

Q. You don't know anything about that letter?

A. No. I know it was written.

Witness excused.

Mr. WITHINGTON.—Mr. Taylor, don't you remember that I asked you if these were all Morris Brothers bonds and you told me they were.

Mr. TAYLOR.—I remember you asked me and I told you that was all the bonds we had in the house of every description. [113]

Testimony of Miss Alice Agler (Recalled).

MISS ALICE AGLER, recalled, was examined as follows:

(By Mr. WINTER.)

Q. Will you look at this letter, Miss Agler? Did you prepare that letter? A. No, I did not.

(Testimony of Miss Alice Agler.)

Q. Do you know who dictated it?

A. It looks to me like it was written by one of the stenographers. Mr. Etheridge's initials are here and the young lady's and it may have been written by Mrs. Granning or someone in her department. If I had written it or signed it there would have been an A there.

Q. Who do you think wrote the letter?

A. Miss Switzler wrote it; her initials are there. I don't understand how she came to write it without someone dictating it, as this was from Mrs. Granning's department.

Q. Was that report you have in your hand attached to the letter?

A. Yes, it is attached to the letter.

The letter and the report offered in evidence and marked Trustee's Exhibit "A." (Two sheets.)

Mr. HART.—I object to this exhibit. It is not a letter that was prepared and found among the property at the time of the adjudication. It is a letter dated December 22, 1920, and was never sent out. It was never mailed.

Q. (Mr. HART.) Miss Agler was this letter ever mailed out? A. No, it was not mailed.

Q. (Mr. CANNON.) You say this letter was never mailed? A. No, it was not mailed.

Q. (Mr. WINTER.) Where did you get this letter? [114]

A. I found that in a desk used by Mrs. Granning—in one of the drawers in Mr. Etheridge's room.

(Testimony of Miss Alice Agler.)

Q. You don't know whether Mr. Etheridge dictated this letter, do you?

A. No, sir, he did not.

Q. You think he did not?

A. I think he did not.

Q. Do you think it was written probably at his dictation?

A. I don't think it was. I don't know how it happened to be written. Mrs. Granning may be able to throw some light on it.

Witness excused.

Adjourned without date. [115]

April 18, 1921, 2:30 P. M.

Pursuant to agreement this matter came on again for hearing for the purpose of taking further testimony. The same parties being present as heretofore at the same place:

Testimony of Earl Edward Edmunds, for Claimant.

EARL EDWARD EDMUNDS, called as a witness and sworn, was examined and testified as follows:

(Examination by Mr. HART.)

Q. Prior to the Morris Brothers bankruptcy adjudication you occupied a position with that company? A. Yes, sales manager.

Q. Were you advised of the sale of some \$60,000 of securities to the Hopkins estate in December, 1920? A. Yes.

Q. Do you know what was done by the Morris

(Testimony of Earl Edward Edmunds.)

organization towards the delivery of these bonds, just prior to the closing of the doors?

A. It was my understanding that Mr. Hopkins came to Portland and made his selection of different blocks of bonds that he would take.

Mr. WINTER.—Just tell us what you know.

Mr. HART.—This is just preliminary.

A. He made his selection of these different bonds and they had to be secured from the different banks where they were up as collateral and they were to be shipped out to them as soon as we received them in our office.

Q. All but \$10,000 of Bay City's were collected by the Morris Brothers company previous to the closing of the doors; is that the fact?

A. I don't know that positively. [116]

Q. What knowledge have you with respect to what was done?

A. On Friday the 23d I saw the package that had been segregated of these bonds; they had been segregated and a black rubber band put around them with a slip of paper stuck under the band designating thereon the fact that they belonged to the Hopkins Estate.

Q. Do you know what was done with that package?

A. The package was lying on top of the big tin box or can that we kept such packages of bonds in, that is bonds that were set aside for certain people.

Q. Do you know whether any steps were taken towards sending them out?

(Testimony of Earl Edward Edmunds.)

A. Not positive, although it was understood they were to go out.

Cross-examination by Mr. WINTER.

Q. Did you say you were general sales manager down there? A. Yes.

Q. As such sales manager would you have general supervision of the sales of all bonds?

A. My authority was very limited; very limited indeed.

Q. It was limited? A. Yes.

Q. Did your duties keep you inside or out on the road with Morris Brothers?

A. I was in the office all the time.

Q. There is something in the letters here that says these bonds were to be shipped to the Hopkins Estate in Pennsylvania by registered mail, insurance prepaid; do you know how that insurance was written?

A. It was written right in the office by Morris Brothers. [117]

Q. For instance, the letter of Morris Brothers dated December 10, 1920, in evidence here as Exhibit One, says the bonds above mentioned are to be delivered to you about December 23, or 24, 1920; we will send same via registered mail insurance addressed to the Estate of A. C. Hopkins, Lock Haven, Pennsylvania. Just tell how they were insured?

A. They were insured through the Pacific States Fire Insurance Company. We had a sort of a branch agency right there in the office of Morris

(Testimony of Earl Edward Edmunds.)

Brothers where the insurance was written.

Q. Were they insured in favor of Morris Brothers, loss if any payable to Morris Brothers.

A. I am not positive of the wording of the insurance policy. I am inclined to think they were. That can be ascertained.

Witness excused. [118]

Testimony of Mrs. Granning, for Claimant.

MRS. GRANNING, called as a witness, was sworn, examined and testified as follows:

Direct Examination by Mr. HART.

Q. You were acting in what capacity with Morris Brothers, Inc., prior to the closing the doors, in December, 1920?

A. I looked after the shipping out of securities and wrote letters regarding sales and different transactions connected with the sending out of bonds and securities.

Q. Do you recall the sale of the bonds to the Hopkins Estate in December? A. Yes.

Q. Will you state what was done prior to the closing of the doors of Morris Brothers regarding getting this purchase of bonds ready for delivery.

A. Yes, the letter was received from the Hopkins Estate setting forth that they wanted a certain amount of bonds and they enclosed a check to us for \$61,000. The bonds were taken out of stock and put up in a package and marked for the Hopkins Estate. They were all taken out with the exception of some \$10,000 of the Port of Bay City bonds

(Testimony of Mrs. Granning.)

of a definite maturity, and they were not set aside because Morris Brothers had intended to take them up from the Port of Bay City as they had been paid for by the Hopkins Estate. When the check was received it was immediately deposited in the bank and a bill made up covering the amount of the bonds that they were buying and a letter written to Mr. Hopkins in Spokane, which letter was never sent out from the office. It was still there in my basket when the doors were closed, I think.

Q. Was the letter signed?

A. The letter was not signed. I had also made out the check [119] covering the amount they had overpaid by their check for \$61,000, and that check was not signed either.

Q. Can you state generally what the contents of that letter was?

A. I might have signed the letter but I do not think I did as Mr. Fred Morris was then in charge of the office and I was not sure what his method of procedure would be; otherwise the letter would have been signed by me.

Q. Will you look at the letter which was introduced in evidence here and marked Exhibit "A," Hopkins, and advise the Court if you wrote that letter?

A. Yes, but there was also an itemized statement of the bonds which should be attached to the letter and also the check for something like \$800 which was to be returned to Hopkins Estate. I am sure this is the letter because I acknowledged receipt of

(Testimony of Mrs. Granning.)

the \$61,000 and it would have been signed and sent out but that was the 24th and Mr. Morris had taken charge and I was not able to get the check signed. There did not seem to be anybody to sign it.

Q. What do you say as to the intent of shipping the \$50,000 immediately or waiting until the whole lot of bonds were received?

A. I was talking to Mr. Pratt about that and he said he thought it was the intention to ship out the \$50,000 that day and then he was going to write a letter to Mr. Hopkins explaining the matter about the Bay City's.

Q. Was it or was it not the intention on the 24th of December to ship out the \$50,000 bonds without waiting for the others?

A. Mr. Pratt said he thought we ought to do that.

Q. Why was that not done? [120]

A. I presume on account of the excitement and the fact that Mr. Morris had taken charge and everything was in an upset state. The bonds were all set aside immediately following the receipt of the check for \$61,000 and were marked for the Hopkins Estate.

Cross-examination by Mr. WINTER.

Q. I call your attention to Exhibit One, a letter written by Morris Brothers, which is in evidence. Do you recognize that letter?

A. I do not. I never saw it.

Q. I call your attention to the copy of a letter marked Exhibit Two; did you ever see the original of that letter? A. No.

(Testimony of Mrs. Granning.)

Q. Now, I call your attention to Exhibit Three and ask you if you ever saw that letter? A. Yes.

Q. That is the letter you referred to when you said you received the check for \$61,000?

A. Yes. When I received the letter and the check I also received an order from the sales department giving a list of the bonds that were to be shipped on that order.

Q. The letter that is in evidence marked Exhibit "A," do you know whether you wrote that or not?

A. I dictated it.

Q. At whose instructions was that letter dictated by you?

A. I was instructed by no one. The mail was put on my desk and it was my duty to handle it and I handled it of my own accord.

Q. The itemized statement you referred to is that the statement attached to this letter? [121]

A. It looks like it; yes.

Q. In this letter you say: It is dated December 22, 1920, and is marked for this record, "Trustee's Exhibit 'A,' Hopkins." "Mr. William P. Hopkins, 215 Jones Bldg., Spokane, Wash. Dear Sir: We have received your letter of December 20th inclosing check for \$61,000 and pursuant to your request inclose herewith itemized statement covering the bonds purchased from us on December 9th. If you find the same in due order kindly advise us and we will make prompt shipment to Mr. Shaffer at Lock Haven, Pa. Awaiting your further advices in connection with this matter and assuring

(Testimony of Mrs. Granning.)

you of our appreciation of this splendid business, we beg to remain, Very truly yours, Morris Brothers, Inc. By John L. Etheridge, President. JLE-CS." Was it your intention to ship the entire lot and enclose him the check for the balance?

A. The check was attached to the statement.

Q. The balance due from Morris Brothers was \$823.65; that was the amount of the check?

A. Yes. I wrote the check but was never able to get it signed.

Q. Was it your purpose to secure the Bay City bonds and then ship them all at the same time?

A. Ship them all at once.

Q. Could you say whether or not at the time this order was taken on the 10th of December, or the 9th of December, you had in your possession any of the bonds covered in this statement?

A. They were all there I presume with the exception of the port of Bay City. We had some Bay City's but not of that particular maturity. [122]

Q. Could you tell whether or not any of these particular bonds were up as collateral?

A. Yes; I heard Mr. Taylor say he had to get these bonds from various sources.

Q. When you got these bonds in, for instance, here is \$10,000 Jefferson County, Idaho Rigby; now, when you received that bond in your house, did you immediately segregate it and set it aside under this particular order?

A. Mr. Taylor handled the securities at that time.

(Testimony of Mrs. Granning.)

Whether those bonds were in San Francisco or some other place, I don't know. I can't tell.

Q. You don't know how that was done?

A. No, I heard him say he had to get these bonds from various place where they were up as collateral, and when I wrote the letter they were all there except the port of Bay City.

Q. Did you look after the insurance?

A. No, our office boy looked after that. I checked it up and signed the letters.

Q. If these bonds had been shipped you would have sent them by registered mail? A. Yes.

Q. Insured? A. Yes.

Q. With loss, if any, payable to whom?

A. To Morris Brothers because we were responsible for the bonds until they arrived at their destination.

Q. That is the way you view it? A. Yes.

Mr. HART.—That was your universal practice?
[123]

A. The bonds were all registered and insured; yes, sir.

Q. Did you pay the insurance charges?

A. It was charged to us.

Mr. HART.—That is all the testimony we have to offer.

Mr. WINTER.—We have nothing further.

Mr. CANNON.—I would like to have briefs. The matter will be then decided. [124]

April 28, 1921, 3 P. M.

The Hopkins Claim was again opened and the following testimony was taken, on the above date, the same parties as heretofore noted, being present at the office of the Referee in Bankruptcy:

Testimony of A. L. Taylor, for Claimant.

Mr. A. L. TAYLOR, called as a witness for the claimant.

Direct Examination by Mr. HART.

Q. Have you gone over the record of Morris Brothers at my request, Mr. Taylor, to determine which of the bonds included in the order of the Hopkins Estate of December 9, 1920?

A. I have.

Q. According to the evidence given in this case, that purchase included \$3,000 Bonner County School District No. 1 5½% bonds, 1932 maturity. How much of that particular maturity did Morris Brothers own *in* December 9, 1920? A. \$4,000.

Q. And what were the numbers of those bonds?

A. Sixteen to 19, inclusive.

Q. Subsequently and prior to the bankruptcy were \$3,000 of this \$4,000 lot set aside and included in a package of bonds for the Hopkins Estate?

A. Yes.

Q. Which numbers were so set apart?

A. Three of these four numbers. I think 16 to 18, inclusive. I could tell that definitely by the sales slip.

(Testimony of A. L. Taylor.)

Q. It does not make any particular difference so long as you can tell. Now, of this same school district, Bonner County, Idaho, School District No. 1, the Hopkins purchase included \$3,000 of the 1933 maturity. Will you say how much of that maturity Morris Brothers owned on December 9, 1920? [125]

A. They owned \$3,000.

Q. What were the numbers of those bonds?

A. From 24 to 26, inclusive.

Q. Those were the bonds which were included in the package set aside with the Hopkins Estate name on it? A. Yes.

Q. The next item in the Hopkins purchase was \$4000 Bonner County School, 1934 maturity; how many of those bonds of that maturity did Morris Brothers own on December 9th, 1920?

A. \$4,000.00.

Q. What were the numbers of those?

A. From 29 to 32, inclusive.

Q. And were they included in the package set aside with the Hopkins name on it? A. Yes.

Q. The next in the Hopkins purchase are the Fremont and Madison counties, Idaho joint school district No. 8, \$3,000 each of the following maturities: 1935, 1936, 1937, 1938 and 1939; how many of each of these maturities did Morris Brothers own on December 9, 1920?

A. They owned \$3,000 of each of those maturities.

(Testimony of A. L. Taylor.)

Q. Were they included in this package that was set aside for the Hopkins estate? A. Yes.

Q. What were the numbers of those bonds?

A. From 11 to 25, inclusive.

Q. The next are the Heyburn-Paul Highway district of Mindoka County, Idaho 6% bonds, \$5000 of the 1934 maturity. How many of those bonds did Morris Brothers own on December 9th, [126] 1920? A. \$5,000.

Q. What were the numbers of those?

A. From 91 to 95, inclusive.

Q. And were they also included in the package you have referred to with the name of Hopkins on it? A. Yes.

Q. The Rigby Independent school district, Jefferson county, #5, 6% bonds. The Hopkins purchase included \$3,000 of the 1932 maturity; how many of these particular bonds did Morris Brothers own on December 9th, 1920? A. \$4,000.

Q. What were their numbers? A. Nine to 12.

Q. Can you tell which three of that four thousand dollars worth were included in the package set aside for Hopkins?

A. No; no more than \$3,000 of this \$4,000 were included in the package for Hopkins.

Q. The next of the Rigby Independents the same as the last mentioned in the Hopkins purchase were \$4,000 of the 1933 maturity, numbered from—do you know their numbers?

A. Thirteen to sixteen, inclusive.

(Testimony of A. L. Taylor.)

Q. How many did Morris Brothers own of those on December 9, 1920?

A. \$4,000 of the 1933 maturity numbered from 13 to 16, inclusive, and these were included on the Hopkins package.

Q. The next of the Rigby Independents were \$3,000 of the 1934 maturity; how many of these did Morris Brothers own on December 9th, 1920?

A. \$4000. [127]

Q. And their numbers?

A. Seventeen to 20, inclusive.

Q. Are you *able* which \$3000 of this \$4000 lot were included in the Hopkins package? A. No.

Q. But were \$3000 of these bonds included in the package? A. Yes.

Q. County of Twin Falls are the next, Buhl Highway District, Idaho, 6% bonds, the Hopkins purchase included \$10,000 of these of the maturity of 1935; how many of these bonds did Morris Brothers own on December 9, 1920? A. \$12,000.

Q. What were their numbers?

A. Numbers 256, 257, 267, 273, 274, 275, 276, 277, 278 and 280. \$2000 out of the \$12,000 was delivered to another purchaser subsequent to this date.

Q. Were the numbers which you have mentioned all contained in the package that you have referred to and which was set aside for the Hopkins estate?

A. Yes.

Q. The next are the Port of Bay City, \$10,000 of 1934. Did Morris Brothers own any of this

(Testimony of A. L. Taylor.)

maturity of the Port of Bay City bonds on December 9, 1920? A. Not to my knowledge.

Q. Can that be ascertained in any way?

A. The only information that I received about that was from Mr. Glenn and from Mr. Pratt. I understood that we were to take up these Bay City's on January first of this year. [128]

Q. Has anyone checked over the Bay City bonds which were on hand at any time between December 9th and the bankruptcy so as to determine whether or not there were any 1934's in stock or owned by Morris Brothers?

A. There were not any 1934's.

Q. Where were the Bonner County bonds referred to on December 9th, 1920, of maturity of 1932?

A. They were at the United States National Bank, Portland, Oregon.

Q. And the 1933 maturities?

A. \$2000 at the United States National Bank and \$1000 at the Seattle National Bank.

Q. And the 1934's?

A. \$4000 at the Seattle National Bank.

Q. And the Fremont Madison School district bonds, \$15,000 from 1933 to 1939 maturities?

A. They were all in the Portland office of Morris Brothers.

Q. In stock? A. Yes.

Q. And the Heyburn-Paul Highway District of Mindoka county, Idaho, \$5000 of 1934?

(Testimony of A. L. Taylor.)

A. \$4000 were in the Portland office of Morris Brothers and \$1000 was in the Seattle National Bank.

Q. And the Rigby Independent School district, #5 of Jefferson County, 1932's?

A. They were at the National Bank of Commerce, Seattle.

Q. And the 1933's Rigby's?

A. National Bank of Commerce, Seattle. [129]

Q. And the Rigby Independents of 1934?

A. National Bank of Commerce, Seattle.

Q. The Buhl Highway district, Twin Falls County, \$10,000 of 1935; where were they on December 9, 1920?

A. \$8000 were with the Central National Bank of Oakland, \$2000 were with the National Bank of Commerce, Seattle.

Q. As you have previously testified all of these bonds you are now referring to which were in the package and set apart for the Hopkins estate and with the Hopkins name on it, were *gather* into the office of Morris Brothers between the 9th of December and the 24th of December? A. Yes.

Mr. HART.—In order that we may be able to make an order in this case, whichever way it goes, correctly—should we not have the specific numbers of all the bonds which were in that package so set apart? Mr. Taylor is able to give us some but he would have to look at the sales slips for the rest.

(Testimony of A. L. Taylor.)

Are you willing he may supply that by sending a note of the numbers to the reporter?

Mr. WINTER.—Yes, that will be all right. Mr. Taylor may write a letter and I will look at it before it is sent to the reporter, and then the reporter may insert it in the record.

Cross-examination by Mr. WINTER.

Q. Looking at that slip there, take the \$3000 Bonner County, Idaho, school districts, 1932 maturity, you say at the time this order was given these bonds were where?

A. At the U. S. National Bank in Portland.

Q. And Morris Brothers did not have possession of them?

A. Not physical possession; no. [130]

Q. What were they doing at that bank?

A. They were up as collateral for a note.

Q. When did they return to the possession of Morris Brothers?

A. Sometime between December 9th and 24th.

Q. How about the \$3000 Bonner County school districts of 1933 maturity; where were they?

A. They were at the Seattle National Bank, Seattle, Washington.

Q. Is it true that these particular bonds at the Seattle National Bank had been sold to that bank on a contract with the understanding that Morris Brothers would buy them back at the request of the bank?

(Testimony of A. L. Taylor.)

A. They were there under a repurchase agreement; yes, sir.

Q. Didn't that repurchase agreement provide that Morris Brothers would buy them back at the request of the bank? A. I believe it did.

Q. It had no provision in it that Morris Brothers had an option to repurchase them?

A. It was not so stated in the repurchase agreement but it was the custom for Morris Brothers to do so.

Q. According to the contract this bank owned the bonds? A. According to the contract.

Q. How about the Bonner County bonds of 1934; where were they?

A. At the Seattle National Bank.

Q. Under the same agreement as the 1933's?

A. Yes.

Q. The next, \$3000 Fremont and Madison counties; where were they?

A. They were in Portland on December 9th.

Q. In the possession of Morris Brothers?

A. Yes. [131]

Q. Did they remain in the actual possession of Morris Brothers from that time until they were put into this separate package? A. Yes.

Q. Did you have all of the \$3000 at that time or just part of them of this district?

A. We had \$15,000 altogether.

Q. You mean \$15,000 of all of the maturities?

A. Yes.

(Testimony of A. L. Taylor.)

Q. What were these maturities?

A. 1935, 36, 37, 38, and 39.

Q. Did you have the entire \$15,000 in your actual possession at the time you took the order?

A. Yes.

Q. Did you have any more than the \$15,000?

A. I might have. I don't remember.

Q. Did you check that at the time to see whether you had more than \$15,000?

A. I was simply verifying to see whether the bonds covered by the Hopkins purchase were covered or not.

Q. You say the entire \$15,000 was in the possession of Morris Brothers at the time you took the order, or the order was taken? A. Yes.

Q. Did they remain there from that time until they were put into this separate package of container? A. Yes.

Q. They were never hypothecated?

A. No. [132]

Q. You don't know whether you had more than \$15,000 or not? A. No.

Mr. HART.—That was the particular thing I wanted you to look up, to find out whether \$3,000 was all you had of each maturity at the time of the sale.

A. There were only \$3,000 of each maturity. I thought Mr. Winter was asking about all maturities. If you refer to these maturities only mentioned in the order, there were only \$3,000 of each of those.

(Testimony of A. L. Taylor.)

Q. Let me get that straight. I referred to the \$3,000 each of 1935, 36, 37, 38 and 39, making \$15,000 in all. I want to know whether you had any more bonds of any of those maturities in stock or whether you owned any more of them at that time? A. No, we did not.

Q. And none of these bonds were hypothecated with any bank or other institution?

A. No.

Q. When were they put into this separate container? A. Between December 9th and 24, 1920.

Q. Were any put into the separate container prior to the 20th of December? A. I think so; yes.

Q. Have you any data over there by which you can testify positively as to that? A. No.

Q. Do you know when you began to set these bonds aside? A. December 9th.

Q. Did you put any in the container on December 9th? A. I did. [133]

Q. At whose direction did you do that?

A. The sale was confirmed by Mr. Glenn and it was customary as soon as a sale was confirmed to begin to fill the order.

Q. Who directed you to do this. Somebody must have told you to do that or you would not have had any knowledge of it. You did not make the sale; they did not give you the order?

A. They gave me the slip, the sales ticket.

Q. You did not make any negotiations on this

(Testimony of A. L. Taylor.)

ticket or on the bonds between these dates when you put them into this container?

A. I made some notations on the ticket.

Q. You made some, as I remember the testimony; you received the check for the bonds on the 22d. Is it your recollection that you took some of these bonds and put them into the separate container prior to the time they were paid for? A. Yes.

Q. So the payment of the purchase price of these bonds had nothing to do with their segregation or setting apart as you have testified? A. No.

Q. You began that work as soon as the order was taken and confirmed? A. Yes.

Q. Wherever you got hold of a bond that went to fill that order you stuck it into the container?

A. Yes.

Q. It didn't make any difference whether you had that bond on hand or got it from some other source?

A. Certainly; that is it.

Q. That covers \$15,000 of the Fremont and Madison bonds; where [134] were these bonds on the 9th of December, 1920?

A. We had \$4,000 in the office and \$1,000 were at the Seattle National Bank.

Q. The \$1,000 at the Seattle National Bank were under that same repurchase agreement or arrangement that you referred to a few minutes ago?

A. Yes.

Q. And \$4,000 were in the office of Morris Brothers at that time? A. Yes.

(Testimony of A. L. Taylor.)

Q. Did they remain in the office until they were put into this separate container? A. Yes.

Q. When you segregated these bonds did you have the entire \$5,000? A. No.

Q. You segregated the \$4,000 and when you got the other \$1,000 you added that to the package?

A. Yes.

Q. At the time you segregated the \$4,000 was it your intention to hold that there until you got the other \$1,000 before you delivered them to the purchaser? A. Exactly.

Q. You wanted to wait until you got them all?

A. Yes.

Q. Now then where were the Rigby Independent School District bonds, \$3,000 1932's, \$4,000 1933's and \$3,000 1934's; at the time you took this order of December 9th the order covered \$3,000 1932's, and at that time you had \$4,000 on hand? [135]

A. Yes.

Q. Do you remember when that segregation was made; when you took the \$3,000 of this \$4,000 you had on hand?

A. No more than that it was between the 9th and the 24th of December. These bonds were not on hand. They were at the National Bank of Commerce, Seattle.

Q. They were there under a repurchase agreement? A. Yes.

Q. Where the bank had the option to compel Morris Brothers to repurchase? A. Yes.

(Testimony of A. L. Taylor.)

Q. And Morris Brothers did not have any right to buy them back under the terms of the contract?

Mr. HART.—We ought to have that contract if you are going to ask questions about it.

Q. Do you remember when you got these bonds back from the Seattle National Bank?

A. Between the 9th and the 24th of December, 1920.

Q. Did you get them in before the 20th of December?

A. Yes, it is possible they came in before the 20th.

Q. And when they came in they were put into this separate container? A. Yes.

Q. How about the other Rigby's, \$4,000 of 1933 maturity?

A. They were at the Seattle National Bank.

Q. Under this same repurchase contract?

A. Yes.

Q. You substituted some other bonds for these and sent them to the Seattle National Bank, did you? [136] A. Yes.

Q. We ought to have that contract?

A. I may find a copy of one of them.

Mr. HART.—Have you any record showing when they were returned from the Seattle National Bank; if you have we ought to have that also.

Q. \$10,000 Buhl Highway District county of Twin Falls, 1935 bonds; where were they?

A. \$8,000 in Central National Bank of Oakland and \$2,000 with the National Bank of Commerce, Seattle.

(Testimony of A. L. Taylor.)

Q. The \$2,000 were under this same repurchase agreement with the Seattle National Bank?

A. With the National Bank of Commerce, yes, sir.

Q. And the \$8,000. They were under a collateral agreement? A. Yes.

Q. How many of these bonds did you have standing out as collateral at the time of taking the order and how many did you have in the office?

A. I had none in the office of the Buhl bonds but I did have \$10,000 out as collateral.

Q. \$10,000 was all that you owned of those bonds?

A. Yes.

Q. Did not own any more of that maturity?

A. No.

Q. Did you have any more than \$10,000 of the Rigby Independent school district bonds?

A. No; we have had more. At that time we had \$21,000.

Q. You had \$12,000 at that time? A. Yes.

Q. And no more than \$12,000? [137]

Mr. HART.—Have you not made a mistake, Mr. Taylor, with respect to the 1932 maturity of the Bonner County bonds? They were not on deposit at the U. S. National Bank, were they?

A. Yes, they were.

Q. I guess you did say that?

A. It was the Rigby's in Seattle.

Q. The 33's and the 34's were in the Seattle National and the 32's in the United States National at Portland hypothecated?

(Testimony of A. L. Taylor.)

A. Only one of the three thousand was at the Seattle National bank.

Q. And the rest?

A. At the United States National in Portland.

Q. All the 32's at the United States National?

A. Yes.

Q. Do you know whether or not between the 9th and the 24th of December, 1920, Morris Brothers acquired any bonds besides those you have testified to that would fill in all the descriptions of the bonds concerning which you have testified?

A. They did not.

Witness excused.

Filed by the Referee, July 12, 1921. A. M. Cannon, Referee in Bankruptcy.

Filed July 19, 1921. G. H. Marsh, Clerk. [138]

Claimant's Exhibit 1—Hopkins.

COPY.

Established Over Quarter Century.

MORRIS BROTHERS, INC.

MUNICIPAL BOND HOUSE

THE PREMIER

Government and Municipal Bonds

Portland, Oregon

Morris Building

309-11 Stark Street

Portland

Portland, Oregon, December 10, 1920.

ESTATE OF A. C. HOPKINS,

Lock Haven, Pa.

Mr. I. A. Shaffer, Jr.,
Lock Haven,
Pennsylvania.

Dear Mr. Shaffer:

Mr. William P. Hopkins was in yesterday and, subject to your acquiescence on the purchases of said bonds, placed with us an order for the following:

PORT OF BAY CITY, 6% bonds,

\$10,000 due 1934

at price to net the estate $61\frac{1}{2}\%$

BONNER COUNTY, IDAHO INDEPENDENT

S. D. #1, $51\frac{1}{2}\%$ bonds

\$3,000 due 1932 \$4,000 due 1934

3,000 due 1933

at prices to net 6%.

FREMONT & MADISON COUNTIES, IDAHO

Joint S. D. #8 6% Gold notes,

\$3,000 due 1935 \$3,000 due 1938

3,000 due 1936 3,000 due 1939

3,000 due 1937

at par and interest to net 6%

HEYBURN-PAUL HIGHWAY DISTRICT of

Mindoka County, Idaho, 6% bonds

\$5,000 due 1934

at par and interest to net 6%.

RIGBY INDEPENDENT S. D. #5, Jefferson

County, Idaho 6% bonds

\$3,000 due 1932 \$3,000 due 1934

4,000 due 1933

at par and interest to net 6% [139]

Shaffer, I. A. 2. 121/10/20
BUHL HIGHWAY DISTRICT, County of Twin
Falls, Idaho 6% bonds
\$10,000 due 1935
at par and interest to net 6%

The bonds above mentioned are to be delivered to you about December 23rd, or 24th, and we are to send the same, via. registered mail insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pa.

Mr. William Hopkins asked us to mail you copies of the legal opinions on each of the issues above mentioned, together with copies of circulars describing the same, and we are accordingly enclosing same herewith.

A statement for the purchases of these bonds will be mailed to you at a later date and we will have a copy thereof sent to Mr. Hopkins at his address in Spokane.

In conversation with Mr. Hopkins, he stated that he might be interested in taking an additional block of the bonds of the PORT OF BAY CITY and with this in view, we have asked the President of the Port of Bay City to furnish us a map of Tillamook County showing thereon the boundaries of this Port District and also other information, to the end that you can better appreciate the value of the security behind this bond issue.

Under date of November 4th, we addressed a letter to Mr. Hopkins on the PORT OF BAY CITY and for your personal information, we are enclosing herewith a copy thereof.

Thanking you very cordially for the business you have given us, we remain,

Yours very truly,

MORRIS BROTHERS, INC.

By JNO. GLENN,

Vice-president,

Encls.

FG—H.

Filed July 19, 1921. G. H. Marsh Clerk.

Filed October 26, 1921. G. H. Marsh, Clerk.

[140]

Claimant's Exhibit 2—Hopkins.

COPY.

December 15th, 1920.

Morris Brothers, Inc.,

Morris Building,

Portland, Oregon.

Dear Sirs:

Today we received your letter of Dec. 10th, containing a list of the bonds, arrangements for the purchase of which my Co-Trustee, Mr. William P. Hopkins, made with you, subject to the writer's approval. We have also received the descriptive circulars of the several bonds referred to, together with copies of the attorneys' opinions as to the legality of the various issues. The writer, basing his conclusion on the data above referred to, and the fact that Mr. Hopkins went over all these matters in person with your representative, believes the various bonds to be first class, and desirable for the investment of trust funds.

You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins.

Very truly yours,
(Signed) I. A. SHAFFER, Jr.,
Trustee, Estate of A. C. Hopkins.

IAS. LR.

Filed July 19, 1921. G. H. Marsh, Clerk. [141]

Claimant's Exhibit 3—Hopkins.

215 Jones Building,
Spokane, Washington, December 20, 1920.
Morris Brothers, Inc.,
Morris Building,
Portland, Oregon.

Gentlemen:

Enclosed you will find my check, as Trustee of the Estate of A. C. Hopkins, for \$61,000.00 to apply on a purchase of municipal bonds made from you on December 9th. Upon receipt of this check please send me an exact statement of our account and if there is any considerable balance due you, I will send you another check. If there is no considerable balance, I will ask you to send the securities on to Mr. Shaffer at Lock Haven, Pa. and let him remit any small balance direct. You will understand that I do not wish to concern myself with the checking of interest and the like here. Mr. Shaffer has an office force in Lock Haven which takes care of that. What I wish to do is simply to pay you in round numbers and have any small difference adjusted from Lock Haven and also to have all interest

figures and the like checked there and of course any necessary adjustments made between you and the Lock Haven office.

Yours very truly,

(Signed) WM. P. HOPKINS.

WPH. BB.

Filed July 19, 1921. G. H. Marsh, Clerk. [142]

Claimant's Exhibit 4—Hopkins.

COPY.

January 5, 1921.

Mr. W. D. Whitcomb, Receiver,
Morris Brothers, Incorporated,
309 Stark Street, City.

Dear Sir:—

The estate of A. C. Hopkins early in December negotiated with Morris Brothers for the purchase of the following Bonds:

PORT OF BAY CITY, 6% bonds.

\$10,000 due 1934.

at price to net the estate $6\frac{1}{2}\%$.

BONNER COUNTY, IDAHO INDEPENDENT

S. D. #1, $5\frac{1}{2}\%$ bonds

\$3,000 due 1932 \$4,000 due 1934

3,000 due 1933

at prices to net 6%.

FREMONT & MADISON COUNTIES, IDAHO,

Joint S. D. #8

6% Gold Notes.

\$3,000 due 1935 \$3,000 due 1938

3,000 due 1936 3,000 due 1939

3,000 due 1937

at par and interest to net 6%

HEYBURN-PAUL HIGHWAY DISTRICT of
Mindoka County, Idaho

6% bonds.

\$5,000 due 1934

at par and interest at net 6%

RIGBY INDEPENDENT, S. D. #5 JEFFER-
SON COUNTY, Idaho

6% bonds.

\$3,000 due 1932 \$3,000 due 1934

4,000 due 1933

at par and interest at net 6%

BUHL HIGHWAY DISTRICT, County of Twin
Falls,

Idaho, 6% bonds.

\$10,000 due 1935

at par and interest to net 6% [143]

Mr. W. D. Whitcomb—2.

A purchase agreement was made which was conditioned upon the approval of one of the trustees in Pennsylvania which approval was thereafter given and on December 20, there was transmitted from Spokane the sum of \$61,000.00 to apply on the purchase price of the bonds. We understand that a large part of the bonds purchased were in San Francisco and were ordered up by telegraph, and were thereafter received and preparations made to deliver them to the Hopkins estate together with a check for a small amount of overpayment.

We have no doubt you will find that these bonds do not appear under the general assets of Morris Brothers, but that the records show them to be the property of the Hopkins estate. This letter is

written to indicate to you that the Hopkins estate will make claim for the delivery of the bonds.

Yours truly,

(Signed) CAREY & KERR.

CAH—DB.

Filed July 19, 1921. G. H. Marsh, Clerk.
[143½]

Claimant's Exhibit No. 5—Hopkins.

COPY.

Established Over Quarter Century

MORRIS BROTHERS, INC.

Municipal Bond House

THE PREMIER

Government and Municipal Bonds

Portland, Oregon

Morris Building

309-11 Stark Street

Portland

January 6, 1921.

(Stamp

(Jan. 8, 1921.

(Carey & Kerr.

Carey & Kerr,

1410 Yeon Bldg.,

Portland, Oregon.

Dear Sirs:

Receipt is acknowledged of your letter of the 5th instant, outlining the status of affairs between the Estate of A. C. Hopkins and Morris Bros., Inc.

136 *William P. Hopkins and I. A. Shaffer, Jr.*

I thank you for the information contained therein.

Very truly yours,

W. D. WHITCOMB,

Receiver in Bankruptcy.

WDW: FB.

Filed July 19, 1921. G. H. Marsh, Clerk. [144]

Trustee's Exhibit "A"—Hopkins.

MORRIS BROTHERS, INC.

Municipal Bond House,

Government and Municipal Bonds,

Morris Building, 309-11 Stark Street.

Portland, Oregon.

No. 3 Central Building,

Ground Floor,

Seattle.

Merchants National Bank Building,

San Francisco.

Portland, Oregon, December 22nd, 1920.

Mr. William P. Hopkins,

215 Jones Bldg.,

Spokane, Wash.

Dear Sir:

We have received your letter of December 20th inclosing check for \$61,000, and pursuant to your request inclose herewith itemized statement covering the bonds purchased from us on December 9th.

If you find the same in due order kindly advise us and we will make prompt shipment to Mr. Shaffer at Lock Haven, Pa.

Awaiting your further advices in connection with this matter and assuring you of our apprecia-

tion of this splendid business, we beg to remain,

Yours very truly,

MORRIS BROTHERS, INC.

By JOHN L. ETHRIDGE,

President. S.

JLE—CS. [145]

COPY of

No. 25953.

Trustee's Exhibit A—Page 2—Hopkins.

MORRIS BROTHERS INC.,

Sold to

Estate of A. C. Hopkins,

Lock Haven, Pa.

Portland, Oregon, 12/22/20.

	\$10,000	JEFFERSON COUNTY, IDAHO	
		RIGBY I. S. D. #5 6% Bonds	
		Dated May 15, 1909. Par	\$10,000.
#9/11	3,000	Due May 15, 1932	
#13/16	4,000	Due May 15, 1933	
#17/19	3,000	Due May 15, 1934	
		Int. from 11/15/20 to 12/21/20	60.
	\$10,000	BUHL HIGHWAY DISTRICT 6% BONDS	
		Dated January 1, 1918	
#256/7 261		Due January 1, 1935. Par	10,000.
		Int. from 7/1/20 to 12/21/20	285.
	\$5,000	HEYBURN PAUL HIGHWAY DISTRICT MINIDOKA COUNTY 6% BONDS.	
#91/15		Dated April 1, 1919	
		Due April 1, 1934. Par	5,000.
		Int. from 7/1/20 to 12/21/20	142.50
	\$15,000	FREMONT MADISON COUNTIES IDAHO J. S. D. #8 6% Bonds	
		Dated June 1, 1919	
#11/13	3,000	Due June 1, 1935	
14/16	3,000	Due June 1, 1936	
17/19	3,000	Due June 1, 1937	
20/22	3,000	Due June 1, 1938	
23/25	3,000	Due June 1, 1939. Par	15,000.
		Int. from 12/1/20 to 12/21/20	52.50

138 *William P. Hopkins and I. A. Shaffer, Jr.*

\$10,000 BONNER COUNTY IDAHO I. S. D.				
#1 5% Bonds				
Dated July 1, 1919				
#16/18	3,000	Due July 1, 1932	95.65	2,869.50
24/26	3,000	Due July 1, 1933	95.42	2,862.60
29/32	4,000	Due July 1, 1934	95.20	3,808.00
Int. from 7/1/20 to 12/21/20				261.25
\$10,000 PORT OF BAY CITY OREGON 6% BONDS				
Dated May 1, 1919				
Due May 1, 1934			95.50	9,550.00
Int. fro 7/1/20 to 12/21/20				285.00
Credit by draft			\$61,000.00	\$60,176.35
Bal due from Morris Bros.			823.65	
			<hr/>	
			\$60,176.35	

Filed July 19, 1921. G. H. Marsh, Clerk. [146]

AND, to wit, on the 26th day of October, 1921, there was received from the Referee in Bankruptcy and duly filed in said court testimony and exhibits taken upon the rehearing, in words and figures as follows, to wit: [147]

In the District Court of the United States for the District of Oregon.

In the Matter of MORRIS BROTHERS. INC., in Bankruptcy.

In the Matter of the Claim of the Estate of A. C. HOPKINS Against the Bankrupt Estate.

Testimony on Rehearing.

At this time, to wit, in the afternoon of September 8, 1921, the above matter came on for hearing before Honorable Anderson M. Cannon, Referee in Bankruptcy, on the order of the District Court of the United States for the District of Oregon, for the purpose of taking further testimony herein to be offered by the claimant.

The bankrupt appeared by its counsel, Mr. John M. Winter, and the claimant by Mr. Charles A. Hart, its attorney.

Thereupon the following proceedings were had and testimony taken: [148]

Testimony of William P. Hopkins, for Claimant.

WILLIAM P. HOPKINS, called as a witness and sworn, was examined and testified as follows:
Direct Examination by Mr. CHARLES A. HART.

Q. Your name is William P. Hopkins?

A. Yes, it is.

Q. You are one of the members of the A. C. Hopkins Estate? A. Yes.

Q. Were you the representative of the Hopkins estate who negotiated with Morris Brothers, Inc. on December 9, 1920, for the purchase of certain bonds? A. Yes.

Q. With whom did you talk about that purchase of bonds? A. With Mr. Glenn.

Q. With Mr. Fred Glenn? A. Yes.

Q. What was the reason for your coming to Portland; did you come for the purpose of purchasing the bonds?

A. Yes, I came especially for that purpose and after that I went to Seattle and bought some bonds from Carstens & Earles.

Q. How did your conference with Mr. Glenn begin?

A. I had had some correspondence with Mr. Glenn. I have never met him before, and then I came on to Portland and was introduced to him,

(Testimony of William P. Hopkins.)

and I went over to his office to see him about the bonds.

Q. Did you go over with him the list of bonds that Morris Brothers had for sale?

A. I did with him.

Q. How was this list prepared if you remember?

A. It was in their regular circular pamphlet, a comprehensive [149] list. The bonds that were sold from that issue in the pamphlet were marked off with a pencil, and it was an up-to-date list.

Q. It was a list or purported to be a list of the bonds that Morris Brothers then had for sale?

A. Yes.

Q. Was there any information given you then as to whether or not any of these bonds were out of the possession of Morris Brothers?

A. No, nothing was mentioned about that.

Q. No information was given you that any of the bonds had been hypothecated anywhere?

A. Nothing.

Q. Did this conference with Mr. Glenn continue throughout that day, Mr. Hopkins?

A. We stayed in conference until lunch-time, that was perhaps an hour and a half; and then we went out and had lunch and after lunch we went in an automobile and looked over Multnomah Drainage District. They wanted to sell me some bonds of the Multnomah Drainage District so they took me out there. Then we came back, I went to the Northwestern National Bank to see Mr. Lamping and he had gone out. That took twenty

(Testimony of William P. Hopkins.)

minutes or so, and then I went down again to Morris Brothers' office and saw Mr. Glenn again, and possibly it was five o'clock, or a little after, when I gave him a definite selection of the bonds.

Q. Up to five o'clock you had not indicated what bonds you were going to take?

A. No, I had not definitely told him the bonds I would take. [150] At that time I told him definitely which bonds I would take.

Q. You say you went down late that afternoon and gave him the definite order?

A. Yes, at that time, about five o'clock.

Q. Did you make up a pencil list of the bonds that you wanted or did you just indicate on the list of Morris Brothers the ones you wanted?

A. As I say, I had this list of Morris Brothers and I just made pencil notations on that list. I think Mr. Glenn made a pencil notation.

Q. You have seen a letter written by Mr. Glenn to Mr. Shafer dated December 10, 1920; did you later secure a copy of that letter? A. Yes.

Q. And is the list specified in that letter the same list that you selected?

Mr. WINTER.—I object to the question as asking the witness to give a conclusion.

Mr. HART.—I will withdraw the question.

Q. Now, Mr. Hopkins, what, if anything, was said at this time by you and Mr. Glenn or in conversation with Mr. Glenn as to the time or manner of payment and the time or place of delivery of the bonds?

(Testimony of William P. Hopkins.)

Mr. WINTER.—I object to that question; it connects up with the statute of frauds, and for the further reason that the record in this case shows that that talk was merely tentative and that the real deal was afterwards made by letter between Morris Brothers and the Hopkins estate.

Mr. CANNON.—The testimony will be received subject to the objection. [151]

Thereupon the last question was read to the witness.

A. I said to Mr. Glenn that we would have some funds in about the 23d or 24th of December with which to take up these bonds, and Mr. Glenn said, "Do you want the bonds sent to Lockhaven with sight draft attached?" and I said, "No, I don't. I want to send the money here and take the bonds up here" and he said, "All right."

Q. Did you indicate to him at that time how you expected to receive the funds, that character of the payment that was coming to the estate?

A. Why, I don't remember about that. I think I told him it was an acceptance. I think I mentioned that to him. Anyway I told him we were going to get the money or would have the money in and that I would send it to Morris Brothers at Portland.

Q. Did you make any statement to Mr. Glenn as to what you wanted done with the bonds after they were paid for?

Mr. WINTER.—All this testimony is subject to my objection.

(Testimony of William P. Hopkins.)

Mr. CANNON.—Yes.

A. I told him after the bonds were paid for he was to send them to Mr. Shafer at Lockhaven.

Q. Now, you subsequently made payment, as the record, I think, already indicates?

Mr. WINTER.—There is no controversy about that, unless you want to couple it up with some other testimony.

Q. Was anything further said in this conversation with Mr. Glenn, or at any time during the day—the 9th of December— [152] as to how and where the delivery of the bonds was to be made?

A. No, there was nothing further said that I can now remember.

Q. Have you *give* the conversation as fully as you recollect it, or the substance of it?

A. As fully as I can recollect it, yes.

Cross-examination by Mr. WINTER.

Q. At the time you had this conversation with Mr. Glenn you told him that any arrangement you made at that time was tentative and was subject to the approval of your cotrustee?

A. Only as to the bonds themselves, yes, that it would not be binding on the estate until the approval of Mr. Shafer was received.

Q. And you saw the letter that Mr. Glenn wrote to Mr. Shafer?

A. I have since seen a copy of it.

Q. Did you see a copy of it before you sent in

(Testimony of William P. Hopkins.)

the money? A. I don't remember that I did.

Q. Do you remember that you did not?

A. I am not positive that I did see a copy of it.

Q. Will you fix the time as near as you can when you first saw the letter marked "Claimant's Exhibit One" and here in evidence?

A. I won't say positively as to that. It seems to me I got a copy of it after the trouble came up, but I can't say positively as to that.

Q. You also have seen Claimant's Exhibit Two?

A. Yes. [153]

Q. When did you first see that?

A. That was received by me in the due course of mail after it was written, I suppose about the 19th or 20th—I would say the 20th of December.

Q. In other words, when your cotrustee, Mr. Shafer, wrote to Morris Brothers Claimant's Exhibit Two he made a carbon copy and sent it to you?

A. He sent me a carbon copy of that letter; yes, sir.

Q. And that was mailed to you at the time it was written? A. Yes, I think it was.

Q. And you had that before you, the carbon copy of that letter, at the time you made payment for the bonds?

A. I made payment on the 20th and I think I had that letter.

Q. You had read this letter Claimant's Exhibit Two at that time? A. I think I had.

(Testimony of William P. Hopkins.)

Q. Your cotrustee had authority to write that letter?

A. Yes. I understood that letter to be merely a direction and I would arrange the terms of payment and that the bonds would be sent to him as arranged by me after payment had been made.

Q. You say that your memory now serves you that at that time you said that you would make payment for the bonds here? A. Absolutely.

Q. Had you seen any of these bonds?

A. No, sir.

Q. Never saw any of them? A. No. [154]

Q. Did you see any of them at the time you carried on your negotiations with Mr. Glenn?

A. I did not see the bonds.

Q. You just saw a list of the bonds?

A. Yes, just as I always do when I buy bonds.

Q. You have had considerable experience in buying bonds?

A. I have bought bonds quite a few times.

Q. If these bonds had been irregular or anything wrong about them you would have rejected them, would you not?

Mr. HART.—That is calling for the conclusion of the witness.

A. I presume I would have had a case against them on the ground of fraud of some kind; I don't know. That would be my supposition.

Q. That is your supposition. At the time you told Mr. Glenn that you would send the money and

(Testimony of William P. Hopkins.)

later take up the bonds here, did you intend at that time to come here personally and get these bonds? A. I did not.

Q. Did you tell Mr. Glenn that you would send the money here and take up the bonds here?

A. Yes.

Q. Just what did you mean by that?

A. Just that; that I would send the money and take the bonds here, in Portland.

Q. And you were not coming here yourself to take them? A. No.

Q. How were you to take them here?

A. I was to send the money here for the bonds and they were to send them to Mr. Shafer. [155]

Q. How did they send them?

A. Through the mail.

Q. How did they send them through the mail, just put them in an ordinary envelope?

A. No, they would not do that; the custom was to send them by registered mail insured.

Q. Insured in whose name? A. I don't know.

Q. Had you ever bought any bonds from Morris Brothers before this time?

A. Yes, I had bought bonds of them before.

Q. And had they sent them to Mr. Shafer?

A. Yes.

Q. By registered mail? A. I presume so.

Q. And they were insured?

A. I presume they were.

Q. And you wanted these bonds sent just the same as the others had been sent?

(Testimony of William P. Hopkins.)

A. Yes, and I presume that was their regular way.

Q. You say that was the instructions you gave Mr. Glenn?

A. I did not tell him that. I say I presume that was the way they would send them. That is my supposition.

Q. You told him you wanted them to be sent by mail the same as the other lot of bonds?

A. I did not tell him that; I presumed he would do that.

Q. What you said to Mr. Glenn was that these bonds were to be sent to Mr. Shafer the same as they had theretofore sent the other bonds you had bought from them? [156]

A. I don't remember that I said that to him. I presumed he would send them that way.

Q. Do you remember saying anything with regard to that?

A. I don't positively remember.

Q. Do you remember when you had the conversation with Mr. Glenn, saying that these bonds should be sent to Lockhaven the same as the other bonds? A. I do not remember saying that.

Q. Do you say that you did not say that?

A. I do not remember whether anything was said about that or not.

Q. Upon that point you have no recollection one way or the other? A. No.

Q. And if Mr. Glenn should testify that you had

(Testimony of William P. Hopkins.)

that conversation, so far as your memory goes that might be right?

A. If he should testify positively that he remembers I said that I would think there would be no doubt about it.

Q. At the least at that time they were going to send the bonds to you the same as they had sent the other bonds which you had bought previous to that; that would be your understanding?

A. Yes, that would be my impression.

Q. And when you said you would send the money and take the money up here and take them up here you meant that they were to be shipped to Lockhaven?

A. No, I did not. I meant that we would take them up here; that they would be paid for here.

Q. Have you testified to everything that was said with relation to the shipment or the delivery of the bonds between [157] you and Mr. Glenn, or between you and any other officer or member of Morris Brothers—in regard to the delivery of the bonds?

A. I had no conversation with anyone else.

Q. You have stated all the conversation you had with regard to the delivery of the bonds with Mr. Glenn? A. I believe I have.

Q. As you now recollect it? A. Yes, I think so.

Redirect Examination by Mr. HART.

Q. You say you told Mr. Glenn you would be ready with your money by December 23d?

(Testimony of William P. Hopkins.)

A. Yes, or 24th.

Q. Or 24th? A. Yes.

Q. And that you would not want the bonds sent with sight draft attached to Lockhaven, but that you intended to make payment and take them up here? A. Yes.

Q. What did you mean by paying and taking up?

A. I meant they were to be paid for, and as I understood it, the purchase closed here.

Mr. WINTER.—I move to strike out the last answer as not responsive and as a conclusion of the witness.

Mr. HART.—You asked him what he meant.

Mr. WINTER.—It is proper for me to ask that but not for you. I am cross-examining him.

Mr. HART.—I think I have a right to ask what he meant also.

Mr. WINTER.—I don't think you have and I object [158] to the question.

Mr. CANNON.—I am not going to stand on technicalities and bar out any testimony. I doubt very much that it is controlling. The question is as to what is the result of what took place between these parties and that is properly a question to be decided by the court.

Q. (Mr. HART.) Did you or did you not make any request of Mr. Glenn at any time that he should put in writing by form of letter to Mr. Shafer, or otherwise, the whole contract that you had made?

A. I did not. I told him, or asked him to send a description of the bonds and the legal opinion to

(Testimony of William P. Hopkins.)

Mr. Shafer, and I went over to the hotel afterwards and sent a list to Mr. Shafer so he would have my list to check against Mr. Glenn's list.

Mr. WINTER.—Q. Have you got that letter you sent to Mr. Shafer?

A. No.

Q. (Mr. WINTER.) Have you tried to get a copy of it?

A. No.

Q. (Mr. WINTER.) Have you tried to get the original?

A. No, I have not.

Mr. WINTER.—I move to strike out what the witness said about writing to Mr. Shafer.

Mr. CANNON.—If you have a letter of that kind you ought to produce it.

Mr. HART.—Q. Where was the letter written?
[159]

A. In the writing-room of the Portland Hotel. I just wrote it with pen and ink.

Q. (Mr. HART.) You have said that you are not certain as to when you secured a copy of the letter Mr. Glenn wrote on December 10 to Mr. Shafer. Is there any circumstance that you can recall later on which would indicate whether or not you had a copy of that letter prior to the bankruptcy?

A. When I came over here after the bankruptcy I wanted to get you (Mr. Hart) a list of the bonds and I found I did not have a list excepting my notations. In order to get a list of the bonds I tele-

(Testimony of William P. Hopkins.)

graphed to Mr. Shafer for the notes. That is all I can remember that has any bearing on that.

Q. During the conversation with Mr. Glenn did you make any statement to him, or otherwise, that your cotrustee would approve of the selection of the bonds that you had made?

A. I said he always had approved my selections and I would send him a list—that inasmuch as we were acting as cotrustees I wanted him to have a list of the bonds and the legal opinion on the bonds.

Recross-examination by Mr. WINTER.

Q. Are you an attorney at law? A. No, sir.

Q. Have never been admitted to the bar?

A. No.

Q. At the time you received the copy of the letter addressed to Morris Brothers by your cotrustee, bearing date December 15, 1920, did you at that time know of the letter Mr. Glenn had written to your cotrustee which is in evidence here?

A. As I have said I only knew of it as it was referred to in that letter. He acknowledges receipt of it, as you see. [160]

Q. When your cotrustee sent you a copy of this letter, Claimant's Exhibit Two, did he write you a letter?

A. I don't remember as to that, I don't think he did.

Q. Your impression is that he simply enclosed the carbon copy of the letter to you in an envelope addressed to you without any letter at all?

(Testimony of Fred Glenn.)

A. I think so, though there may have been a letter stating that he was enclosing it.

Mr. WINTER.—That is all.

Mr. HART.—That is all.

Witness excused. [161]

Testimony of Fred Glenn, for Claimant.

Mr. FRED GLENN was called as a witness and having been previously duly sworn in this matter was examined and testified as follows:

Direct Examination by Mr. HART.

Q. You were the representative of Morris Brothers, with whom Mr. William P. Hopkins negotiated for the purchase of bonds on December 9, 1920, were you not? A. I was.

Q. How did you put in that day—where did you first meet Mr. Hopkins, and what did you do? Just state briefly.

A. As I recall, Mr. Hopkins came to the office early in the morning about nine o'clock or half-past nine; he came to my office and I discussed with him relative to certain bond issues and methods used for the collection of taxes, etc. We previously had had considerable correspondence and the discussion was merely supplemental to the correspondence I had carried on with him.

Q. What did you do next—did he lunch with you?

A. Yes, we went out to lunch together.

Q. Then what?

A. Then we took an automobile and went out over

(Testimony of Fred Glenn.)

the Multnomah Drainage District; we were figuring on selling them some of the bonds of that district; we were figuring on purchasing some of them and at my suggestion he went out to look over the district. We went out and walked over a part of it. During the automobile ride we discussed relative to bonds in general.

Q. When you returned where did you next see him; what took place next?

A. As I recall, we drove up in front of the Northwestern Bank [162] building and we dropped him there and he said he would probably come down later after he had talked with somebody up there that he knew, and I went on down to the office of Morris Brothers?

Q. Did he come later to the office of Morris Brothers?

A. He came in very shortly afterwards, unexpectedly early. Apparently he was not able to get in touch with the party he was expecting to meet and he got back to our office about five o'clock, or thereabouts, as I remember.

Q. What took place then?

A. Well, we went upstairs to my office and he selected the bonds that he evidently decided in his own mind to purchase.

Q. Up to that time had he indicated definitely what he wanted?

A. No, he had not indicated what he expected or intended to purchase up to that time.

(Testimony of Fred Glenn.)

Q. You say he then made a definite selection of the bonds he would purchase?

A. Yes, he then made the definite selection.

Q. In the morning when you talked over the bonds with him, what was the basis of your talk? I mean by that, did you have before you any list or statement of bonds which Morris Brothers was offering for sale?

A. Not that I recall at all. We did not talk of any specific bonds.

Q. I don't believe you understand me; were you endeavoring to get for him any bonds that he might want, or were you offering him bonds that Morris Brothers had for sale?

A. I really don't remember that we talked of any specific bonds in the morning, and on the ride we just talked of bonds [163] generally. I don't know that I exactly understand your question.

Q. Were you undertaking to act as the agent of Mr. Hopkins to secure for him any bonds wanted by him, or were you endeavoring to sell him bonds of Morris Brothers?

Mr. WINTER.—I object to the question as leading.

Mr. HART.—All right, I will withdraw it.

Q. Did you have before you during your conversation with Mr. Hopkins any *printed* printed, type-written or other list of bonds that Morris Brothers were offering to the general public?

A. As I recall, I had no list during the morning session. When we went out in the automobile, at

(Testimony of Fred Glenn.)

Mr. Hopkins suggestion—he said, “you had better take along a list of what you have and we can go over it and talk about them to and from the end of the ride,” so I got one of our regular circulars describing a number of issues that we had available for sale.

Q. Did you indicate to Mr. Hopkins at any time that any of these issues that were available for sale were not then in the possession of Morris Brothers?

A. No.

Q. Or that any of them were hypothecated to banks? A. No.

Q. Did you know yourself at that time what, if any of them, were not actually in Morris Brothers' possession?

A. I did not know. That was not in my department and I would not be in touch with that part of the business.

Q. Now, Mr. Glenn, at the five o'clock meeting you say that Mr. Hopkins definitely indicated the particular bonds that he proposed to purchase? [164]

Mr. WINTER.—I object to the question as leading and suggestive.

Mr. HART.—I only wanted to ask him further about what he has already testified to.

Mr. CANNON.—I think it is leading.

Question withdrawn.

Q. At that time, Mr. Glenn, state what, if anything, was said regarding the necessity for securing the approval of Mr. Hopkins' cotrustee, Mr. Shafer.

A. Mr. Hopkins explained that he and Mr. Shafer

(Testimony of Fred Glenn.)

were cotrustees of the estate for which the bonds were purchased. He stated that usually Mr. Shafer was willing to acquiesce in anything he saw proper to recommend; however, inasmuch as he was the cotrustee of the estate, he would want his acquiescence before an actual sale was made; that is, the sale was made subject to Mr. Shafer's approval.

Q. What directions, if any, did Mr. Hopkins give you at that time with reference to advising Mr. Shafer of the bonds selected by Mr. Hopkins?

A. He asked me to send Mr. Shafer circulars on each of these issues, and also to send him, as I recall, legal opinions on each issue; that is copies of the legal opinions on each issue.

Q. Did you do that, Mr. Glenn?

A. As I recall, I did.

Q. And is this letter of December 10th which you wrote to Mr. Shafer, and which is in evidence here, the letter with which you transmitted such information?

A. I will have to look at the letter. (Witness looks at the letter.) [165]

Q. Is that the letter?

A. Yes, this is the letter which is marked Claimant's Exhibit One.

Q. I call your attention, Mr. Glenn, to the statement in this letter, Claimant's Exhibit One, to the effect that "the bonds above mentioned are to be delivered to you about December 23d or 24th, and we are to send the same via registered mail," and I ask you what, if anything, was said to you by Mr. Hop-

(Testimony of Fred Glenn.)

kins on December 9th concerning the delivery or payment on December 23d or 24th?

Mr. WINTER.—I object to that question as coming within the statute of frauds, and furthermore that the agreement between the Hopkins Estate and Morris Brothers at that time was reduced to writing and is contained in the two letters marked Claimant's Exhibits 1 and 2 herein and any oral conversation had prior thereto would be merged in the agreement.

Mr. CANNON.—You may answer subject to the objection.

A. During the afternoon Mr. Hopkins stated that he expected to receive a considerable sum of money from an acceptance which would be paid on or about that time,—or within a couple of weeks from the time of our conversation. As I recall, I asked him relative to the delivery of the bonds and he stated that he would send a check to Morris Brothers for an amount sufficient to take up all of the bonds and that possibly there would be a few hundred dollars in excess of the amount necessary to pay for the bonds inasmuch as we could not figure; we did not at that time know how much accrued interest there would be on the bonds. [166]

Q. You mean by that the interest according to the coupons on the bonds?

A. Yes.

Q. You could not tell, if I may ask this leading question, until you knew the date of payment, how

(Testimony of Fred Glenn.)

much accrued interest there would be to add to the purchase price? A. That is right.

Q. And he said—

A. He said, if there was an excess you can either return it or we can arrange between us to take another bond.

Q. Did you make any notes or memorandum at that time of this transaction—of this purchase?

A. Yes, I made memoranda so I would be enabled to write a letter.

Q. Was that memoranda made during the time of your conversation? A. Yes.

Q. I show you seven sheets of pencil notations on white paper and ask you if these sheets constitutes the memoranda that you made at that time?

A. Yes.

Thereupon the claimant offered the said sheets identified by the witness in evidence and the same were marked “Claimant’s Exhibit Six.”

Q. These notes are in your own handwriting, are they, Mr. Glenn? A. Yes.

Mr. WINTER.—We object to the offer of these papers as exhibits in this case on the ground that they are incompetent, irrelevant and immaterial, and that they [167] come within the statute of frauds and that they cannot be offered to vary the agreement made between the parties as contained in Claimant’s Exhibits 1 and 2, and further, that no foundation has been laid for the memoranda or the offer thereof.

Mr. HART.—On the ground of “foundation”—

(Testimony of Fred Glenn.)

were these notes made during the time of your conversation with Mr. Hopkins, Mr. Glenn?

A. They were.

Q. And they are in your own handwriting?

A. Yes, they are.

Mr. HART.—I submit the papers as an exhibit.

Mr. CANNON.—They may be received as an exhibit subject to the objection.

Q. Mr. Glenn, I call your attention to the first statement on this memorandum, which says: "Will arrange to take up about Dec. 23-24." What brought about the making of that note?

A. What brought about the making of that note?

Q. Yes.

Mr. WINTER.—We wish our objection to apply to all testimony relative to this exhibit six.

Mr. CANNON.—That is understood.

A. Mr. Hopkins indicates that the money would be received by them about that date.

Mr. WINTER.—We object to what Mr. Hopkins "indicated." [168]

A. (Continued.) Mr. Hopkins said the money would arrive about the 23d or 24th.

Q. The next item of the exhibit is, "Make all statements to Lockhaven—send copy to Spokane. He will send check to cover." Is there any explanation that you make in regard to what that means?

A. It means that the bonds should be billed to Lockhaven and copy of the bill should be sent to Spokane.

Q. Then I call your attention to the note on the

(Testimony of Fred Glenn.)

next page reading, "Send circular and copy of attorney's opinion. Get off tomorrow."

A. Yes. That means we were to send a copy of the attorney's opinion on each issue purchased with the circular describing the bond issue.

Q. Now, what, if anything, was said by Mr. Hopkins as to what was to be done with the bonds after they were paid for?

A. They were to be sent to Lockhaven to the Hopkins Estate.

Q. Will you give as nearly as possible what was said on that subject by Mr. Hopkins?

A. My recollection is that I was merely instructed to send the bonds or cause the bonds to be sent to Lockhaven.

Q. Can you say whether or not that instruction followed or preceded Mr. Hopkins' statement that he would be ready to pay for and take up the bonds about December 23d or 24th?

A. I think it followed,—in fact, I rather think that it was towards the end of the conversation regarding it—the transaction for the purchase of the bonds—now, let me see, what is that question again.

Question read as follows: "Can you say whether or not that [169] instruction followed or preceded Mr. Hopkins' statement that he would be ready to pay for and take up the bonds about December 23d or 24th?"

A. I rather think it followed. Can I amend my answer?

Q. Just make any statement you want?

(Testimony of Fred Glenn.)

A. That this would merely be a service that Morris Brothers would perform under any circumstances.

Mr. WINTER.—I move to strike out the answer as giving a conclusion and opinion of the witness and it has no bearing on the case and is not responsive to the question.

Mr. CANNON.—I think it is not responsive to the question.

Mr. HART.—It is not responsive, of course. It is merely to convey to the referee what Morris Brothers would do under any circumstances. I can ask another question, if you want me to.

Mr. WINTER.—The objection is clear. You can ask any other question you desire.

Mr. CANNON.—I don't think that statement really has any bearing on this contract. It is not material. The question is, what these people agreed to do.

Mr. HART.—Of course all we want is to show the referee exactly what took place, and this would obviously be of some assistance in showing the methods used by Morris Brothers in handling such a transaction, but I will ask Mr. Glenn some other questions. [170]

Q. (Mr. HART.) What was the usual method of Morris Brothers at that time in respect of the forwarding of bonds purchased after they had been fully paid for?

Mr. WINTER.—We object to that question as immaterial, incompetent and irrelevant and has no

(Testimony of Fred Glenn.)

bearing on the allegations of the petition, and that the contract which was reduced to writing is clear and free from ambiguity and could not be varied by custom.

Mr. HART.—Let me suggest that we have already had testimony from other witnesses on this same subject.

Mr. CANNON.—It has been gone over, I think, before, and I do not want to keep any testimony out, so you may answer subject to the objection.

Questions read as follows: “What was the usual method of Morris Brothers at that time in respect of the forwarding of bonds purchased after they had been fully paid for?”

A. I believe they were usually sent by registered mail; in fact, I am sure they were.

Q. Was there anything said during any of these conversations about making formal delivery of these bonds at Lockhaven?

A. Nothing further, as I recall, excepting that the bonds were to be sent to Lockhaven.

Q. Was there any statement at any time or any request or question as to whether or not the bonds were to be forwarded to Lockhaven, sight draft attached, or were to be taken up in Portland?

A. I did not get that. [171]

Last question read as follows: “Was there any statement at any time or any request or question as to whether or not the bonds were to be forwarded to Lockhaven, sight attached, or were to be taken up in Portland?”

(Testimony of Fred Glenn.)

Mr. CANNON.—What he wants to know is this: Was anything said or any agreement entered into as to whether the bonds were to be sent to Lockhaven or whether they were to be taken up here?

A. The bonds were to be paid for here in Portland and merely sent to Lockhaven. There was no sight draft to be attached because they had already been paid for.

Q. (Mr. HART.) Did you ask Mr. Hopkins in in the first instance as to whether or not the bonds were to be sent to Lockhaven sight draft attached?

Mr. WINTER.—That is clearly leading.

Question withdrawn.

Cross-examination of Mr. GLENN by Mr. WINTER.

Q. Mr. Glenn, what was the name of the representative of this Hopkins Estate that you saw?

A. Mr. Hopkins. I don't know what his initials are.

Q. You don't know his initials?

A. I don't recollect his initials.

Q. Had you ever seen him before that day?

A. Never had.

Q. Had he ever bought any bonds from Morris Brothers before that time?

A. Morris Brothers had sold him some. I personally had not. [172]

Q. Do you remember when that sale was made?

A. About two or three months before. It must have been thirty days before anyway or maybe sixty

(Testimony of Fred Glenn.)

days; at any rate, we were very much surprised to receive thirty to forty thousand dollars through the mail,—a check for that amount. It was quite a surprise.

Q. You sold them \$40,000 worth of bonds before this? A. Yes, Morris Brothers did.

Q. How were those bonds delivered?

Mr. HART.—Let me caution the witness to testify only to what he knows of his own knowledge and not what he learned from somebody else.

Mr. WINTER.—He has testified they bought the bonds.

Mr. HART.—You may ask him what the occasion was, if he knows.

Mr. WINTER.—I am cross-examining him on your direct examination.

Mr. HART.—I simply desire to have him advised that he can only testify to what he knows personally. Go ahead.

The WITNESS.—What is the question?

Q. (Mr. WINTER.) How were these forty thousand dollars of bonds delivered?

A. In the ordinary way; the usual method of delivering bonds, I presume. I am not conversant with how that particular lot of bonds were delivered.

Q. You don't know anything about that?

A. Not more than the ordinary method. [173]

Q. Do you know anything about how those particular bonds were delivered?

A. I don't know; no, sir.

(Testimony of Fred Glenn.)

Q. Did you have any information about that at the time you talked to Mr. Hopkins?

A. About the delivery of the bonds?

Q. The delivery of the bonds they had bought before that time?

A. No, sir, I had nothing to do with that sale.

Q. Did you talk to Mr. Hopkins about the delivery being made of these bonds the same as the other bonds they had bought, that the delivery would be the same? A. I did not.

Q. Are you positive about that?

A. Never had any business with Mr. Hopkins except by correspondence before this.

Q. In this conversation that you had with Mr. Hopkins at that time, at the time this preliminary arrangement was made for the purchase of these bonds in controversy, was anything said that they were to be shipped the same as the other bonds which they had bought from Morris Brothers?

A. I do not recall any such instructions.

Q. You don't recall any such instructions?

A. No.

Q. On the second sheet of Claimant's Exhibit Six you have a memorandum to this effect—"Ship bonds to Est. of A. H. Hopkins, Lockhaven, Pa." Is that right? [174] A. Yes.

Q. And you made this memorandum just as you were talking with Mr. Hopkins? A. Yes.

Q. And therefore this memorandum or statement that the bonds were to be shipped to the Estate of A. H. Hopkins, Lockhaven, Pa., that matter was

(Testimony of Fred Glenn.)

evidently discussed before anything was said of the different kinds of issues that he was buying?

A. Not necessarily.

Q. Then you did not make these notes as the conversation occurred?

A. They may not now be arranged in the order that I made them.

Q. Would you arrange them in the order they were made?

A. I could not place them in the order they were made. Just a minute let me see the sheets.

Mr. HART.—Did you not change the order of the sheets, as I am sure this was on the top.

Mr. WINTER.—No, I did not change their order. The reporter marked this one on the bottom.

Mr. HART.—I thought you had changed them as I noticed your looking through them.

Mr. WINTER.—No, I did not change them.

Mr. HART.—Then I owe you an apology.

Mr. WINTER.—That is all right. May I be permitted to go ahead with my examination? Have you any further answer to make to my last question, Mr. Glenn?

A. As I recall it now, there was no discussion until after the bonds were purchased; naturally there wouldn't be any. [175]

Q. Would you place these sheets in the order that you made the memoranda?

A. I would have to take the pamphlet of Morris Brothers from which the selection was made; we sat across the table from each other and each had a

(Testimony of Fred Glenn.)

pamphlet and we started at the first of it and he says, "I will take so many of each one of these issues," and along like that, and I made a memorandum as he indicated the bonds he would take. In other words, the plan made of this memorandum would be the selection that he made.

Q. On your part you had a list which you used?

A. I had what we called our bulletin containing a description of the bonds available for sale at that time.

Q. Containing a list of the bonds?

A. With a description of the various issues.

Q. You did not have any particular bonds before you at the time you talked to him? A. No.

Q. Mr. Hopkins did not examine any bonds at all? A. No.

Q. He did not see any bonds at all? A. No.

Q. He did not examine any of the bonds as to the validity of the bonds? A. No.

Q. Some of the bonds had not been issued at that time?

A. I think every bond had been issued but some of them had not yet been taken up.

Q. Part had not been taken up? Had the Bay City bonds been issued?

A. They had been issued but not paid for. [176]

Q. Had not been received by Morris Brothers?

A. Certain parts of the bonds, of the \$260,000 issue up to fifty to sixty thousand had been taken up and they wanted to deliver them to us; they were pressing us to take delivery at that time. Those

(Testimony of Fred Glenn.)

bonds were not available at that time, of course.

Q. You did not have them at that time?

A. I telephoned to the teller who had charge of the bonds and he stated that they were not on hand at that time?

Q. You telephoned at the time Mr. Hopkins was there? A. I telephoned at that time to find out.

Q. Was Mr. Hopkins present when you telephoned?

A. I don't think he heard the conversation.

Q. Was he present in your room when you telephoned? A. I think he was.

Q. Was he in hearing of what you said?

A. Yes, he sat there across the table from me, he no doubt heard my part of the conversation.

Q. He heard your part of the conversation. How did you happen to call up to ascertain whether these bonds were in the possession of Morris Brothers, or not?

A. I had no information as to what bonds were actually unsold and what bonds had been sold so I had to telephone down to find out what the books showed.

Q. Didn't you know at the time you talked to Mr. Hopkins that a number of these bonds had been hypothecated?

A. I did not know that because I had no intimate knowledge how they ran their finances. [177]

Q. You and Mr. Hopkins did not talk of any specific bond but you talked of bonds of a certain kind? A. We talked about specific maturities.

(Testimony of Fred Glenn.)

Q. But any bond that had that maturity would fill *them* bill?

A. I think so. There were just certain numbers of these bonds left; that is just a certain part of the different issues remained unsold.

Q. The only thing you discussed, you had a list of certain kinds of bonds giving the maturities and a description of the bonds? A. Yes.

Q. And Mr. Hopkins said he would take a certain number of each kind of these particular maturities?

A. He said he would take a certain number of a certain designated maturity and as I remember most of these issues were pretty well cleaned up by his purchase.

Q. The day following this conversation you wrote the letter that is here in evidence as Claimant's Exhibit One, did you not? A. I did.

Q. At the time you wrote that letter the conversation that you had had with Mr. Hopkins was still fresh in your memory and you also had before you the memorandum in evidence made by you and marked Claimant's Exhibit Six? A. I did.

Q. The letter states "the bonds above mentioned are to be [178] delivered to you about December 23d or 24th and we are to send same via registered mail insured addressed to the Estate of A. C. Hopkins, Lockhaven, Pa." You put that statement in that letter? A. Yes.

Q. You had not said anything to Mr. Hopkins about insuring these bonds?

(Testimony of Fred Glenn.)

A. I don't think so. I don't often mention that in a conversation.

Q. Did you in this conversation?

A. I don't think so.

Q. Was there any reference to it at all?

A. Not to my memory; not in accordance with my recollection.

Q. Do you know at this time whether the other shipment of bonds previously sold them was sent insured?

Mr. HART.—He said he did not know anything about it.

Mr. WINTER.—Let him answer.

A. I rather imagine they were but I don't know anything about that transaction.

Q. What was your business with Morris Brothers? A. Buying bonds.

Q. And selling bonds?

A. No, not selling. This was the only sale I made. That is the only sale I ever made for them so far as I recollect.

Q. How did you happen to make that statement in your letter that they were to be sent insured by registered mail?

A. It is the customary method of delivering, the ordinary way of all bond houses so far as I know.

Q. How were they insured; what was the customary method in regard to that? [179]

A. I have no knowledge as to how Morris Brothers insured their bonds; the customary method would be to take out insurance in the name of Mor-

(Testimony of Fred Glenn.)

ris Brothers, or any other bond house for the matter, in delivering bonds.

Q. You say you never sold any bonds except these?

A. That was the only lot of bonds I sold while I was with Morris Brothers.

Q. You have had considerable experience in dealing with bonds? A. Since 1908 constantly.

Q. You have heretofore observed that some times bonds are issued a little irregularly?

A. They have been.

Q. Yes, they have been. You had some experience with the trustee in the sale of bonds that were issued irregularly did you not?

A. Not to my knowledge. I don't know of any bonds that I ever sold that were irregularly issued.

Q. Don't you remember that you or the trustee sold some bonds that were rejected because of some irregularity in delivery?

A. I never saw those bonds. I simply acted as agent for the trustee to facilitate the sale. As I understand it, the bonds had certain endorsements on them which specified that the bonds had been sold to a certain sinking fund and that they had been registered the interest to be paid only to the sinking fund to which these bonds were sold, therefore in order to make the bonds transferable it would be necessary to obtain an annulment of that order.

Q. And therefore it was not a good delivery?
[180]

Mr. HART.—That is a question of law. It is not

(Testimony of Fred Glenn.)

proper cross-examination and calls for a conclusion of law.

Mr. CANNON.—What is this for any way?

Mr. WINTER.—He has testified to what their general custom is in sending out bonds and I have a right on cross-examination to go into that to show it is necessary in the sale of a bond that there is to be a delivery the same as in the sale of anything else.

Mr. CANNON.—You may answer.

Q. Was it a question of law or question of the custom?

A. It was a good delivery and would have been binding upon these people because they took the bonds without any qualification or question as to their character.

Q. And you made a good delivery?

A. Yes. They refused to accept them and there could have been an action brought against these people for breach of contract for they bought them without any qualification whatsoever.

Q. Isn't it a custom between bond sellers and buyers in order to constitute a good delivery that the bonds must be delivered according to certain terms and in accordance with certain regularities?

A. They are ordinarily always accompanied by the opinion of some recognized bond authority attached to the bond issue.

Q. As to the legality of the issue? A. Yes.

Q. I am not talking about that phase. Is it not true that if the bond is not regular, for instance, if

(Testimony of Fred Glenn.)

the coupons are not [181] numbered regularly, that it mars the marketability of that bonds?

A. I would say that they could not be sold at all.

Q. Notwithstanding they might be entirely regular in other respects?

Mr. HART.—I don't think witness understands counsel. The legal opinion of the attorneys always covers such points in the issue as well as to the regularity of the issue. A. Yes; I think so.

Q. You are familiar with the bond issue of Vancouver?

A. Vancouver, Washington, or Vancouver, B. C.?

Q. Vancouver, Washington; are you familiar with that issue? A. I can't say that I am.

Q. Do you know that Morris Brothers bought some of the Vancouver, Washington, bonds?

A. I did not buy them while I was there. I might say that some of the bonds came into Morris Brothers without anybody apparently looking at them consequently they might have taken up some bonds that were not regular or in due order.

Q. You explain this now. Assuming that, for instance, the coupons attached to these bonds were not regularly made out so that coupon number one would become due a year after coupon number two, or six months after, something like that, after the date of the issue; would that affect the marketability of the bonds?

A. I don't think so to any degree, if I understand you.

Q. Not to any degree?

(Testimony of Fred Glenn.)

A. That might be done in order to allow the district or the [182] municipality issuing it to collect their taxes so as to have money to pay the interest coupons.

Q. What I mean is, in numbering the coupons the second coupon to be clipped matured, say, six months before the first one?

A. I never saw any bonds that were issued that way.

Q. I suppose not; I am saying, presuming they had been printed that way?

A. Well, I don't think anybody would buy them; I don't think any bond house would take them. It is a part of their duty to examine the bond issues they are offering for sale to see that all such things are regular.

Q. It is these little irregularities, in numbering and so forth, that causes bond houses to reject them?

A. Not to my knowledge. They are examined before paid for, or should be.

Q. You had a lot of bonds at Morris Brothers that were never examined by anybody?

A. I say that was so and it was the fault of their system of handling the bonds and allowing somebody to take them in that didn't know very much about them, some clerk or somebody.

Q. At the time that you talked to Mr. Hopkins did he say anything to you to the effect that your office had already been advised in the manner of the delivery of these bonds?

(Testimony of Fred Glenn.)

A. I do not recollect whether he said anything like that. He didn't see anybody regarding those bonds excepting myself so far as I know.

Q. Did he say anything to you that your office had already been advised regarding the shipping of the bonds?

A. I do not recall any such instructions or statement. [183]

Q. I hand you a paper and ask you to look at it?

A. I wrote that letter.

Q. Did you write that letter on the date it bears, December 10, 1920? A. Yes.

Q. That was a letter or memorandum for your own use and the use of your office?

A. Use of the office. That is my interpretation of the conversation.

Q. That was written the day after you had this conversation with Mr. Hopkins? A. Yes.

Q. And that was written the same time you wrote a letter which is in evidence as Claimant's Exhibit One? A. I think so.

Q. This memorandum contains the statement that "Mr. Hopkins advises that our office has already received instructions regarding shipping the bonds"—since reading that memorandum is your memory refreshed as to the conversation you had with Mr. Hopkins?

A. No, excepting the bonds were to be sent to Lockhaven, Pa., as I have already stated.

(Testimony of Fred Glenn.)

Q. That is the same as in your own memorandum? A. Yes.

Q. Have you stated everything that you can recollect that was said in regard to the delivering of these bonds?

A. I think so. The whole conversation probably consumed only fifteen or twenty minutes during the time he selected what bonds he bought.

Q. Selected the different kinds of bonds? [184]

A. The whole conversation—he sat right across the table from me and the whole conversation did not consume a period of more than twenty minutes I would judge. Of course these notes were only made in a general way because we never expected to have any questions arising.

Mr. WINTER.—That is all.

Mr. HART.—That is all.

Witness excused.

Mr. HART.—During Mr. Hopkins testimony the other day, his attention was called to a letter which he received from his cotrustee, and I am anxious to have everything that is necessary before this hearing is closed and if you think it important I will procure that letter. Mr. Hopkins has sent for the letter and when he receives it will forward it to me. It would take a matter of a week or ten days.

Mr. WINTER.—I don't know what the letter contains. I remember when Mr. Hopkins testified I said I thought the letter would be the best evi-

dence, but as far as I am concerned I do not care for the letter.

Mr. HART.—I thought you wanted the letter and that you thought it was a matter of some importance, and I am anxious to have anything that I can get which is thought of importance, but so far as I am concerned I do not care to delay or postpone this case for that letter if the Referee does not want it. Aside from that letter the claimant does not desire to offer any further testimony. [185]

Mr. CANNON.—It seems to me if the letter was of any importance it would have been presented here before this time; however, if you care to postpone the matter until you receive it you may do so.

Mr. HART.—I do not care to do so. I will rest.

Mr. WINTER.—We have no testimony to offer.

Witness excused.

Case closed.

Filed October 26, 1921. G. H. Marsh, Clerk. [186]

Complainant's Exhibit No. 6.

Will arrange to take up about Dec. 23-24.

Make all statements to Lockhaven. Send copy to Spokane. He will send check to cover. [187]

Send circular and copy of attorney's opinion.

Get off tomorrow.

I. A. Shaffer, Jr. Lockhaven, Pa.

178 *William P. Hopkins and I. A. Shaffer, Jr.*

Ship bond to Est. of A. H. Hopkins, Lockhaven,
Pa. [188]

Rigby Ind. S. D. #5

3000 — 1934

4000 — 1933

3000 — 1932

10000

Buhl Highway Dist.

10,000 of 1935

Dec. [189]

Port of Bay City.

\$10,000 — 1934

Likely take another 10 or 20 thousand.

10,000

5,000

10,000

10,000

10,000

15,000

\$60,000 [190]

Mr. Hopkins
Bonner Co. S. D. #1

3000 — 1932

3000 — 1933

4000 — 1934

10000

Tremont & Madison

~~3000~~ ~~1935~~ 3000 — 1939

~~3000~~ ~~1936~~ 3000 — 1938

~~3000~~ ~~1937~~ 3000 — 1937

~~1000~~ ~~193~~ 3000 — 1936

3000 — 1935

The Hayburn Paul H. D.

5000 — 1934 [191]

Get full data Re Multnomah Drainage Dist. [192]

Port of Bay City

2000

1925 — ~~3,800~~ 1000 in 1000 Dem.

26 — 21,000

27 — 22,000

28 — 5,000

~~29~~

30 — 500

260 Sec.

25 — 26,000

26 — 26,000

27 — 26,000

28 —	11,000	
29 —	4,000	
30 —	4,000	
31 —	1,000	
32 —	1,000	
33 —	1,000	25,000
34 —	none	26,000

Filed October 26, 1921. G. H. Marsh, Clerk.
[193]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 2 to 193, inclusive, constitute the transcript of record on appeal from the order of the District Court of the United States for the District of Oregon upon the petition of William P. Hopkins and I. A. Shaffer, Jr., Trustees of the Estate of A. C. Hopkins, Deceased, appellants, against Earl C. Bronaugh, as Trustee in Bankruptcy of the Estate of Morris Brothers, Incorporated, Bankrupt, appellees. That the foregoing pages are a true and complete transcript of the record and proceedings had in said court in the matter of said petition of said trustees of said A. C. Hopkins Estate as the

same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$54.35, and that the same has been paid by the said appellants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this 15th day of December, 1921.

[Seal]

G. H. MARSH,
Clerk. [195]

[Endorsed]: No. 3810. United States Circuit Court of Appeals for the Ninth Circuit. William P. Hopkins and I. A. Shaffer, Jr., as Trustees of the Estate of A. C. Hopkins, Deceased, Appellants, vs. Earl C. Bronaugh, as Trustee in Bankruptcy of the Estate of Morris Brothers, Inc., Bankrupts, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 19, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE 5
United States Circuit Court
of Appeals
For the Ninth Circuit

WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as
Trustees of the Estate of A. C. HOPKINS, Deceased
Appellants

v.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the
Estate of MORRIS BROTHERS, INC., Bankrupt
Appellee

Brief of Appellants

Upon Appeal from the United States District Court
for the District of Oregon

CAREY & KERR and CHARLES A. HART
Attorneys for Appellants

JOHN P. WINTER
Attorney for Appellee

FILED

JAN 27 1922

F. D. MONCKTON,

LIST OF CASES CITED.

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IN THE
United States Circuit Court
of Appeals
For the Ninth Circuit

WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as
Trustees of the Estate of A. C. HOPKINS, Deceased
Appellants

v.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the
Estate of MORRIS BROTHERS, INC., Bankrupt
Appellee

Brief of Appellants

Upon Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE.

This is a dispute over the ownership of \$50,000 of municipal bonds which came into the possession of the appellee as trustee in bankruptcy of Morris Bros., Inc., a Portland bond house, after its bankruptcy adjudication in December, 1920. Appellants had entered into a purchase contract for these bonds

with the Morris Company and before the doors were closed had paid the purchase price in full and the Morris Company had collected together the purchased bonds, labelled them with the purchaser's name and refrained from placing them in the mail only because of the disturbed conditions due to the impending bankruptcy. (Record, p. 110.)

The referee after much deliberation concluded that under the terms of the purchase contract as he found them to be, delivery of the bonds was essential to the passing of title, and upheld the trustee in refusing to turn them over. The District Court affirmed the referee's order, but later, upon appellants' application, vacated the order of affirmance and sent the proceeding back to the referee for a rehearing. The referee upon rehearing adhered to his original decision. The District Court upon review affirmed the referee's order, adjudging that title had not passed; and a decree was entered disallowing appellants' claim to the bonds. The appeal to this court questions the correctness of this order and decree.

The facts are not in dispute. Because of the informal character of the several hearings before the referee, the record does not give the history of the transaction in a very orderly fashion; but the essential facts may be summarized as follows:

The Morris Company closed its doors December 24, 1920. A day or two before, the active head of

the concern, John L. Etheridge, had left the city hastily, and Fred S. Morris had taken charge temporarily. At his direction, voluntary bankruptcy was resorted to and a receiver was appointed December 27, 1920.

Appellants, William P. Hopkins and I. A. Shaffer, Jr., are trustees of the estate of A. C. Hopkins, deceased. Mr. Hopkins lives at Spokane, Washington, and Mr. Shaffer at Lock Haven, Pennsylvania. Having made previous purchases of bonds for the estate from the Morris Company and knowing that the estate would soon have a substantial sum for investment, Mr. Hopkins went to Portland on December 9, 1920, for the purpose of buying municipal securities. He spent a part of the day with Fred Glenn, a representative of the Morris Company, and an agreement was reached (subject to the approval of Mr. Hopkins' co-trustee, Mr. Shaffer,) for the purchase of the following bonds:

Rigby School District No. 5, 1932 maturity	\$ 3,000.00
Rigby School District No. 5, 1933 maturity	4,000.00
Rigby School District No. 5, 1934 maturity	3,000.00
Buhl Highway District	10,000.00
Heyburn-Paul District	5,000.00
Fremont & Madison Joint School District, 1935 maturity	3,000.00
Fremont & Madison Joint School District, 1936 maturity	3,000.00

Fremont & Madison Joint School District, 1937 maturity	3,000.00
Fremont & Madison Joint School District, 1938 maturity	3,000.00
Fremont & Madison Joint School District, 1939 maturity	3,000.00
Bonner County, Independent School Dis- trict No. 1, 1932 maturity.....	3,000.00
Bonner County, Independent School Dis- trict No. 1, 1933 maturity.....	3,000.00
Bonner County, Independent School Dis- trict No. 1, 1934 maturity.....	4,000.00
Port of Bay City, 1934 maturity.....	10,000.00

The contract of purchase was not reduced to writing, although Mr. Glenn made notes of the details of the transaction, which notes were introduced in evidence (Record, p. 177). When the bargain was concluded, Mr. Hopkins stated that the Estate would not be in funds until December 23 or 24, at which time it would be prepared to pay for and take up the bonds; and that when this was done the bonds were to be sent to the Estate's office at Lock Haven, Pennsylvania. Mr. Glenn was directed to forward at once to the co-trustee, Mr. Shaffer, descriptive matter and legal opinions covering each issue of bonds selected so that Mr. Shaffer's approval of the purchase could be secured. This was done the following day, December 10, 1920, Mr. Hopkins also sending Mr. Shaffer a list of the bonds purchased and the prices to be paid.

In the letter of December 10, 1920, with which Mr. Glenn thus transmitted circulars and legal

opinions to Mr. Shaffer, the statement was made that:

“The above mentioned bonds are to be delivered to you about the 23rd or 24th and we are to send the same by registered mail insured addressed to the Estate of A. C. Hopkins, Lock Haven, Pennsylvania.”

Mr. Glenn testified that this letter was dictated from the notes made during the conversation with Mr. Hopkins the day before; and he explained that the statement of the letter regarding delivery “about December 23 and 24,” referred to Mr. Hopkins’ explanation that the Estate would be ready to pay for and take up the bonds at that time; and he (Glenn) merely repeated the direction Hopkins had given him as to the disposition of the bonds when they were so paid for and taken up. (Record, pp. 156-163.)

Both Hopkins and Glenn understood that Hopkins was to make payment for the bonds by remittance from Spokane about December 23 or 24, the remittance to cover the total purchase price with the amount of interest on each bond accrued to the time of payment added, and, when payment was thus made, the bonds were to be forwarded to Lock Haven (Record, pp. 157, 158), Glenn having offered to send the bonds to Lock Haven with draft attached and Hopkins having declined the offer, stating that he would pay for and take up the bonds at Portland. (Record, p. 142.)

The other Hopkins trustee, I. A. Shaffer, Jr., approved the purchase by letter dated December 15, 1920, sent to the Morris Company in answer to Mr. Glenn's letter of December 10; and Mr. Shaffer added that Mr. Hopkins would make payment for the bonds and that the bonds were then to be sent to the Estate's office at Lock Haven.

At the time of the purchase negotiations (December 9), Mr. Hopkins assumed he was buying specific bonds then owned and in possession of the Morris Company; and Mr. Glenn, representing the Morris Company having no other information than that given by the company's advertised list likewise supposed this to be the situation. As subsequent developments showed, however, some of the issues selected were in the possession of banks as collateral to loan obligations of the Morris Company, and others were held by banks as the result of a sale which included a repurchase agreement. In one instance, the Port of Bay City 1934's, the Morris Company had none of the particular maturity specified (though entitled to secure them under a contract with the Port), and did not acquire any prior to the bankruptcy; so that the claim now made necessarily excludes the \$10,000 of Bay City bonds. \$19,000 of the total (\$4,000 Heyburn-Paul District and \$15,000 Fremont & Madison Joint), were actually in the possession of the Morris Company on December 9; and the purchase took

all that the Morris Company had of the particular maturities selected. (Record, pp. 114, 118.)

Immediately after the purchase agreement of December 9 was made, the Morris Company began assembling the bonds purchased. On December 10, the bonds actually in stock (\$19,000 Heyburn-Paul and Fremont & Madison Joint), were placed in a special container and to these were added the others (except the Bay City bonds), as fast as they were gotten back from the banks; \$6,000 of the Bonner County bonds were taken back from the United States National Bank of Portland and were thus set apart for the Hopkins purchase on December 14; \$4,000 of the same issue (1934 maturity) with \$10,000 of the Rigby bonds, \$1,000 of the Heyburn-Pauls, and \$3,000 of the Buhl Highways came in and were added on December 17; and the remainder, \$7,000 of Buhl Highways, were received from an Oakland bank on December 22. Thus on the day last named there had been assembled by the Morris Company \$50,000 of the total of \$60,000 ordered; and the bonds thus assembled had been segregated from the general stock of the Morris Company and had been placed in a container in anticipation of their delivery to the Hopkins Estate. (Record, p. 82.)

On December 20, Mr. Hopkins wrote to the Morris Company from Spokane, enclosing a check for \$61,000.00, stating that it was to apply on the pur-

chase of bonds made December 9, and directing the Morris Company to calculate the accrued interest on each bond (from the last coupon date to December 22, when his letter was received), and if with this interest added to the total purchase, there was an overpayment, to remit it to Mr. Shaffer at Lock Haven; or if there was a deficit to send a bill for the amount short to the Lock Haven office.

This remittance of \$61,000.00 was received by the Morris Company on December 22, and it at once credited to the Hopkins Estate on its books \$60,176.35, the amount of the purchase price with coupon interest to December 22, added, and prepared a check in favor of the Hopkins trustees for the overpayment of \$823.65. There had previously been placed upon the Morris books a debit entry for the purchase price of the bonds, with the accrued interest, so that when the remittance from Spokane was received and credited, the books of account of the Morris Company showed the matter to be a closed transaction. (Record, p. 99.) And the subsequent audit by the receiver's accountants did not list the Hopkins Estate as a creditor. (Record, p. 100.)

Between December 22, when the payment was made and the last of the \$50,000 of bonds came in, and December 24, when the concern closed its doors, preparations were made to mail the bonds to Lock Haven. It was decided not to delay forwarding

them because of the absence of the \$10,000 of Bay City bonds and directions were given by Vice-President Pratt to send along the \$50,000 of bonds which were ready. (Record, p. 110.)

With the addition of the bonds which came in December 22, the package had become too bulky for the special container,—the “black can” in which customers’ bonds ordinarily were kept, and the package was transferred to the general receptacle, but it was held together by a large size band, underneath which there was inserted a slip of paper bearing the name “Hopkins”. (Record, p. 106.) This was the situation on December 24, and all of the Morris employes having to do with the situation agreed that but for Mr. Etheridge’s sudden departure and Mr. Morris’ unwillingness to assume responsibility in view of the state of affairs he found on December 24, the bonds would have gone forward. (Record, pp. 75, 94, 102, 106, 107.)

There was found in the files of the Morris Company a letter dated December 22 addressed to Mr. Hopkins which seemed to indicate that Hopkins’ approval of the account rendered was to be secured before the bonds were to be sent (Record, p. 110), but this letter was not mailed. Its suggestion is not consistent with the directions given by Mr. Hopkins in his letter transmitting the payment; and the testimony makes clear that but for the confusion resulting from the hasty departure of the president,

the bonds would have been in the mails en route to Lock Haven when the concern closed its doors December 24, 1920. (Record p. 110.)

The appellants' claim is that the \$50,000.00 of bonds thus bought and paid for, and thus recognized by the seller as belonging to them, are their bonds. Title passed prior to the adjudication and the trustee should be required to give them up.

SPECIFICATION OF ERROR.

The court erred in holding and determining that the title to the bonds claimed by appellants had not passed prior to the adjudication of bankruptcy; and in holding and determining that notwithstanding the absolute character of the sale, the payment in full of the purchase price and the complete segregation and identification of the property sold prior to the bankruptcy adjudication, the title did not pass to the appellants; and the court erred in refusing to direct the trustee in bankruptcy to deliver over the bonds claimed to appellants.

ARGUMENT.

With the facts clearly in mind, the single question presented by this appeal, whether title passed prior to the bankruptcy adjudication, should not be difficult of solution. The intention of the seller and the buyers governs; and the intention is to be ascertained from the terms of the contract and the acts of the parties in its execution. Each case undoubtedly is determined by its own facts. But the precedents, particularly in the Federal Courts, leave no room for doubt that the existence of certain essentials compels an inference of intention to pass title. When there are combined (1) a sale absolute in terms, (2) identification of the property sold, and (3) payment of the purchase price, the thing sold becomes the property of the buyer; and this, regardless of any unfulfilled obligation on the part of the seller to make delivery.

H. Baars & Co. v. Mitchell, 154 Fed. 322.

McElwee v. Metropolitan Lbr. Co., 69 Fed. 302.

Hatch v. Standard Oil Co., 100 U. S. 124, 136.

Harris v. Egger, 226 Fed. 389.

Terry v. Wheeler, 25 N. Y. 520.

Mitchell v. LeClair, 43 N. E. (Mass.) 117.

Rohde v. Thwaites, 6 B. & C. 388.

The conclusion of the District Court is difficult to understand. The three essentials just stated were present in the transaction under review; and not one case can be found, in English or American

legal history, which denies that a combination of these factors results in a transfer of title. As we shall later point out, the sale contract between the Morris Company and the Hopkins Estate did not place upon the seller the responsibility for delivery of the bonds sold. But if it did, no court in this country or in England has thus far held that such an obligation delayed the passing of title, where the sale was absolute, the property identified, and the price paid.

H. Baars & Company v. Mitchell, supra, (a decision of the Court of Appeals for the Fifth Circuit), is exactly in point. Indeed, it differs principally from the case at bar in that the sale contract there under consideration expressly required the seller to deliver. The seller, R. R. Cowan, contracted to sell to the Baars Company all the lumber on hand and to be manufactured at his mill at Cowan, Florida, during a certain period; and he was to deliver the lumber at Pensacola. Performance of the contract began and certain lumber was stacked in the mill yard and was known and designated as "Baars' lumber." Cowan had billed on the Baars Company for the lumber thus stacked and the Baars Company had made partial payments as required by the contract, the balances being payable upon delivery. Cowan became bankrupt and the trustee took possession of the stacked lumber. The court held that the lumber belonged to the Baars Com-

pany and referring to the Supreme Court's decision in *Hatch v. Standard Oil Company*, *supra*, said:

"In the light of this high authority, it seems that, in the present case, all the requisites to a binding sale were complied with. There was an undisputed agreement for one party to sell, and another to buy. The thing was specially designated, described and segregated. The price was fixed and payments were made as agreed. Although the agreement may have been to some extent executory, it being for the purchase and sale of all lumber of a certain description 'now on hand at the mill of R. R. Cowan, Cowan, Florida, and all that he will manufacture' during a specified period, yet when the lumber was manufactured and segregated and the bills of sale with full details of description were presented and accepted, and payment made according to the contract, there was a complete sale of the property designated in the bills, and the title thereto at once vested in Baars & Company; and this notwithstanding under the contract, it remained with Cowan to deliver the lumber at Pensacola and for Baars & Company to pay the balance of the price less railroad freight on delivery. As between Cowan and Baars & Company, there does not seem room for question as to the rights of the parties. Of course, in the matter now before us, the trustee of Cowan's estate in bankruptcy stands in Cowan's shoes."

"The trustee, however, contends that in the present case, the title did not pass, because the delivery was not made. The lumber had not been inspected and the insurance clause in the six months' contract indicates that the title was to remain in Cowan. As to the delivery, it is disposed of by *Hatch v. Oil Co.*, *supra*; and see *McElwee v. Metropolitan Lumber Co.*, 69

Fed. 305, where in a case involving a contract in many respects similar to this, Judge Lurton disposes of the questions of delivery, insurance and inspection."

It is impossible, as we think, to find any essential difference between this case and the case at bar; except that difference (the express obligation to effect delivery and the partial payment only of the purchase price), which aids appellants' contention in this case. Here there was an absolute sale, certainly after the approval of the second Hopkins trustee; there was payment in full of the purchase price, including an amount representing the earnings (the accrued coupon interest), of the bonds up to the time of payment; and lastly, there was a complete identification and segregation of the \$50,000.00 of bonds, full authority to make that identification and segregation having been given by the payment of the price and the direction to forward the bonds purchased to the Hopkins trustee at Lock Haven.

The Court of Appeals for the Fifth Circuit in its opinion in the *Baars* case adopts the rule theretofore stated by the Court of Appeals for the Sixth Circuit in the case of *McElwée v. Metropolitan Lumber Co.*, 69 Fed. 305. In the *McElwée* case, Judge Lurton spoke for the court, which was composed of Chief Justice Taft, Circuit Judge Lurton, and District Judge Severens. The case was also one of the sale of mill products, the seller agreeing

to pile the lumber at its plant where it was to be inspected and subsequently to be shipped as directed by the buyer; the buyer promising to give promissory notes for the purchase price as the lumber was piled and before delivery, upon monthly statements rendered by the seller. The contract not only provided for later delivery by the seller, but it allowed to the buyer a final inspection at the time of delivery; and it appeared also that after the lumber had been piled and prior to delivery, insurance upon it was carried in the name of the buyer. The opinion of the court stresses the fact that payment of the purchase price was made (through the giving of the promissory notes), and the fact that the lumber was actually identified and thus appropriated to the contract. The decision says:

“That particular lumber became appropriated to the contract and the vendee under the agreement was obliged to make his promissory note to the vendor for the price payable ninety days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract.”

In treating of the effect upon the passing of title of the obligation to deliver, Judge Lurton in the *McElwee* case said:

“Neither did the provision that the vendor should deliver at Chicago prevent the title from passing before such delivery. Undoubtedly the general rule is that if the seller obligates him-

self as a part of his contract to deliver the property to the buyer at some specified place title will not pass until such delivery. (Citing cases.) 'Slight evidence' says Mr. Benjamin, 'is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all of the circumstances.' Benjamin, Sales, Sec. 329. Here the lumber cut, inspected, and measured was completely identified. Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer. In paying for the lumber the price of the freight was deducted. Under such circumstances, it would be difficult to say that, if the lumber should be destroyed without fault of the seller, the loss would not fall on the buyer."

The case of *Terry v. Wheeler*, 25 N. Y. 520, is said by the court (in the *McElwce* case), to be much in point. There was before the court in *Terry v. Wheeler* the question of transfer of title in a case in which there was an obligation to make delivery but where payment of the purchase price had been made. The following language from the decision is quoted by the court in the *McElwce* case:

"No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after the delivery at a particular

place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee and not as owner. *Hobbs v. Carr*, 127 Mass. 532; *Weld v. Came*, 98 Mass. 152; *Lingham v. Eggleston*, 27 Mich. 324; *Underhill v. Booming Co.*, 40 Mich. 660; *Booming Co. v. Underhill*, 43 Mich. 629, 5 N. W. 1073; *Steam Mill Co. v. Brown*, 57 Me. 9; *Hatch v. Oil Co.*, 100 U. S. 135; *Dyer v. Libby*, 61 Me. 45."

This is the law in the Fifth Circuit and in the Sixth Circuit, and it is the rule accepted generally; and we repeat that no reported case in England or America, before or after the adoption of the Uniform Sales Acts, denies it. The combination of a sale absolute in terms, identification of the property sold and payment of the purchase price, compels an inference of intention to transfer title, regardless of any question of delivery or obligation to deliver.

With this principle in mind, let us examine the facts shown by the record in this case to ascertain to what extent there were present the three essentials necessary to the passing of title.

(1) That an absolute sale was contemplated by the Morris Company and the Hopkins trustees is not questioned. The parties on December 9 spoke

not of an agreement to purchase, but of a purchase, subject only to the approval of the co-trustee, Mr. Shaffer. This approval was given by letter dated December 15. The Morris Company was selling and the Hopkins trustees were buying bonds which the Morris Company had advertised as belonging to it and for sale; and with an identification of the bonds and the payment of the price, the transaction would be complete.

(2) No dispute exists over the presence of a second essential, the payment of the purchase price. On December 20, Mr. Hopkins sent from Spokane a check for \$61,000.00 to apply, as his letter said, "on the purchase of bonds made December 9." He directed that any overpayment or deficit (depending upon how much interest had been earned on each bond from its last coupon date to the date of the remittance), should be adjusted with the Lock Haven office. The amount necessary to pay for the entire lot (including the \$10,000.00 Bay City bonds), turned out to be \$60,176.35, so that the purchase price of the \$50,000.00 of bonds claimed was on December 22, paid in full.

(3) The third and only other essential to the transfer of title was the identification of the property sold. The sale was absolute, at least when the letter of Trustee Shaffer of December 15, was received, and the purchase price was paid on December 22; and it remains to be seen whether on or

about the time of payment and before the bankruptcy adjudication, the bonds were sufficiently identified and, in the language of the Supreme Court in *Hatch v. Standard Oil Company*, "appropriated to the contract."

Mr. Hopkins on December 9 directed the Morris Company to forward the bonds, after they had been paid for and thus "taken up", to Lock Haven; and the same direction was given by Mr. Shaffer in his letter of December 15. Neither of the Hopkins trustees contemplated going to Portland when the money was paid, so that this direction authorized and required the Morris Company to select the particular bonds (where the purchase did not include all the Morris Company owned of any particular issue), to be appropriated to the contract.

On December 10, all of the specified bonds which were actually in the possession of the Morris Company (\$19,000) were taken from the general stock and put in the container ordinarily used for customers' bonds. To these were added on December 14, \$6,000.00 more taken back from a Portland bank. On December 17, \$18,000.00 additional came in from a Seattle bank and were included and on December 22, \$7,000.00 was secured from an Oakland bank; so that on December 22 there had been collected in and set aside for the purpose of filling the Hopkins purchase all of the Rigby, Buhl Highway, Heyburn-Paul District, Fremont & Madison Joint

and Bonner County School District bonds, totaling \$50,000.00. The Bay City bonds (\$10,000.00), although paid for, were not secured and, of course, were never identified or appropriated to the contract.

In a number of instances no selection of particular bonds was required, since the purchase called for all that the Morris Company owned of the particular issue or maturity. This was true of the Fremont & Madison Joints, \$15,000.00, the Heyburn-Pauls, \$5,000.00, the Rigby 1933's, \$4,000.00, and the Bonner County 1933's, and 1934's, \$7,000.00. Where less than the total Morris Company holding was specified, the required number was taken out. To illustrate, the Morris Company owned Bonner County 1932's, Nos. 16, 17, 18 and 19. The Hopkins order called for three, and Nos. 16, 17 and 18 were, on December 14, placed in the special container for the Hopkins purchase.

Thus on December 22, the day on which the purchase price was paid in full, all of the bonds now claimed had been set aside for the specific purpose of appropriation to the Hopkins sale contract; and there were combined then the three essentials necessary to a completed transaction—to the passing of title—(1) an absolute sale, (2) payment of the purchase price, and (3) complete identification of the property sold.

But before the bankruptcy, there were additional steps taken which made clearer the appropriation of these \$50,000.00 of bonds to the Hopkins contract. When the last lot came in on December 22, and it was known that the Bay City bonds could not be secured until later, it was decided to send on at once to Lock Haven the bonds then ready. The bonds were taken from the special container, made into a package, and the package was labelled "Hopkins." A check for the overpayment of \$823.65 was written, but there was no one then in authority to sign it. Mr. Etheridge had left the city secretly and Mr. Fred Morris—a stranger to the recent activities of the company—had taken charge. Bankruptcy was imminent and Mr. Morris would assume no responsibility.

The bonds were not mailed, but only the impending bankruptcy prevented the act of mailing. They were made into a package and labelled with the name of their owner, ready for the expected mailing; and these acts were authorized by and were in conformity with, the buyer's directions, given December 9 and December 15. We submit that nothing short of an actual manual delivery of the bonds could accomplish such a complete identification of the property sold—so complete an "appropriation to the contract."

Under the Uniform Sales Act and under *Hatch v. Standard Oil Company*, 100 U. S. 124, 134, it

could well be urged that in all cases where no selection of particular bonds was needed (where the sale was of all that the Morris Company owned), title passed when the sale became absolute and before the purchase price was paid. And as to the others (where three out of a lot of four were bought), there is abundant authority for the proposition that since the bonds were alike in quality and value (fungible goods, under the Uniform Sales Acts), and there was no choice or selection contemplated by the parties, title to an undivided interest in the lot passed the moment the sale became absolute. Williston on Sales, Sections 156, 158; 24 Ruling Case Law, p. 25.

But the circumstances of this case make it unnecessary to invoke either of these rules. Before the bankruptcy all of the bonds claimed were paid for in full and pursuant to the buyer's direction they were segregated and gotten ready for mailing; they were identified with the buyer's name and were fully appropriated to the contract.

Payment of the purchase price could not alone result in the passing of title. The \$10,000.00 of Bay City bonds were paid for but title was not acquired. But as to the bonds claimed, when the buyer's act of paying the price was coupled with the seller's act (preparatory to mailing pursuant to the buyer's directions), of setting apart and identifying the property bought, there was supplied every element necessary to a perfect and complete sale.

Ordinarily one who pays for an article purchased before it is delivered to him does so in order that he may acquire ownership at once. A man who selects a suit of clothes from the stock of a merchant and pays for it undoubtedly intends by the payment to become at once the owner of the particular suit selected; and the passing of title is unaffected by the fact that the merchant may have obligated himself to make delivery. Similarly, if the purchase is of one of a number of suits all alike, and the buyer sends the price to the merchant and directs him to forward one out of the lot, there is no reason to doubt the intention to acquire title without waiting for the actual change of possession. Indeed, it is difficult to understand why a buyer should pay over his money before getting the thing bought, except for the purpose of acquiring ownership immediately. As suggested by the court (Judge Lurton) in the *McElwee* case, retention of title to the property by the vendor after payment, would leave the vendee without security for the payment he had made.

The payment which was made by the Hopkins trustees and the reasons for that payment, leave no room for doubt as to the buyer's intention to acquire title at once. When the transaction was negotiated December 9, Mr. Glenn, the Morris representative, offered to send the bonds, with draft attached, to the Lock Haven office of the Estate. Mr. Hopkins declined this offer, stating that he would

make payment for the bonds at Portland, whereupon they were to be sent to Lock Haven. Why should he prefer to pay over \$61,000.00 a week or more before the Estate was to get actual possession of the bonds? The answer is obvious. The bonds were earning interest, as evidenced by the coupons attached. The Hopkins money was idle and the trustees wanted it put to work at once. Each day's delay in acquiring ownership of the bonds meant the loss of that much of the earnings. The purchase price was paid in advance of delivery *for the express purpose* of acquiring immediate ownership and the consequent right to the earnings of the bonds from the time of payment on.

That the intention to transfer title without waiting for delivery was shared by the Morris Company is equally clear. Mr. Hopkins upon transmitting \$61,000.00 on December 20, directed the Morris Company to calculate the accrued interest and ascertain the exact amount to be paid. The Morris Company did this, charging the Hopkins Estate with an amount representing the interest accrued on each bond from the date of its lowest numbered coupon to December 22.

By thus retaining the moneys earned by the bonds up to December 22, the Morris Company clearly indicated its intention to relinquish ownership and transfer title as of that date. On its books of account a debit item was posted charging the

Hopkins Estate with the purchase price, plus the interest earned to December 22, and a credit entry was made showing the payment in full of the amount thus debited; and according to the books, the purchase was a closed transaction.

Intention alone may not transfer title. The payment made and the interest adjustment applied as well to the \$10,000.00 of Bay City bonds, and both parties desired to pass title to these as well as the other bonds. The Morris Company itself did not get title to them and the intention to transfer title could not be carried out. But when the clearly evidenced intention of both parties was coupled with an actual segregation and identification of the \$50,000.00 of bonds which *were* gathered together for that purpose, and when this act of segregation and identifying was done in pursuance of the buyer's direction to send the purchased bonds on, these bonds certainly became the property of the buyers.

There was left undone merely the transfer of physical possession. Whether the responsibility for effecting delivery at Lock Haven was upon the seller, seems unimportant. Under the law, both the common law and the Uniform Sales Act, the intention of the parties governs. To say that title to this property could not pass until the change of physical possession is to deny to the buyer and the seller the right to do what they intended to do and did do—to bring into combination prior to the bank-

ruptcy (1) an absolute sale, (2) payment of the purchase price, and (3) identification of the property sold, and thus to transfer the title.

Why then did the trustee in bankruptcy refuse to give up the bonds? And upon what did the District Court base its conclusion that title had not passed? Chief reliance seems to have been placed upon the theory that the sale contract obligated the seller to make delivery, and that because of the unfulfilled obligation to deliver, an intention to defer the transfer of title must be inferred. In addition, the claim was made, and it was noticed by the court, that the segregation by the Morris Company was insufficient because apparently revocable and unauthorized. We shall discuss these two propositions in the order stated.

I.

In support of the claim that delivery was necessary to pass title to the bonds sold, Rule 5 of the Rules of Intention of the Uniform Sales Act is invoked. This act as adopted in Oregon does not differ from the Sales Act in effect in other states and in England. The five rules designed to aid in ascertaining intention on the question of passing of title appear as Section 8182, Oregon Laws. The statute is specific in its declaration that these rules are not binding rules of construction, but are available only where a different intention does not ap-

pear, and Section 8181 of the Oregon Code says that:

“For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.”

Rule 5, Section 8182, is as follows:

“If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon.”

1. It should first be noted that the Uniform Sales Act was not intended to change the law on the subject of transfer of title as it had been declared by the courts of England and America. It has always been the law that, a contrary intention not appearing from the contract or the circumstances, a purchase of an article to be delivered by the seller imports an intention to pass the title upon delivery. Change of possession is the most frequent evidence of change of ownership. Judge Lurton in *McElwee v. Metropolitan Lumber Company* (whose statement of the rule we have quoted, *supra*), points out that:

“Undoubtedly the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery.”

69 Fed. 302, 305.

But the very cases which state this general rule (and *McElwee v. Metropolitan Lumber Company* is a conspicuous example), make clear that when before the required delivery, the purchase price is paid and the property segregated and identified, a contrary intention *does* appear. The parties have made clear by their acts that despite the unfulfilled obligation to deliver, they intended the title to pass at once, and this intention governs.

The following observation of the court in *Terry v. Wheeler*, 25 N. Y. 520, is quoted with approval in *McElwee v. Metropolitan Lumber Company* and is in point:

“If the payment was to be made on or after the delivery at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller’s merely because he is engaged to transport it to a given point.”

Williston on Sales (page 409), in discussing this particular rule of intention of the Uniform Sales Act, points out that the significance of an obligation to deliver readily yields to circumstances showing an intention to pass title at once; and he adopts the statement of Benjamin on Sales, which was referred to with approval by the Court of Appeals of the Fifth Circuit in the *McElwee* case. Quoting from the text of Williston, at page 409:

"It must constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely and will yield to proof of a contrary intention. Probably the statement of Benjamin, quoted with approval by the Circuit Court of Appeals, accurately sums up the matter. 'Slight evidence,' says Mr. Benjamin, 'is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances.'"

Thus the rule prevailing in the Fifth Circuit and the Sixth Circuit is equally applicable under the Uniform Sales Acts. Mr. Williston (who drafted the Uniform Sales law), makes clear that the intention of the parties and the acts done pursuant to their intention must govern; and the courts in the cases cited have determined that payment of the purchase price and identification of the property sold indicate an intention to transfer title regardless of the question of delivery. The Uniform Sales Act therefore adds nothing to appellee's case. Without it he is entitled to invoke the rule that unless a contrary intention appears, an unfulfilled obligation to deliver defers the passing of title; and we are brought back to the question of what circumstances indicate such contrary intention.

2. *H. Baars & Company v. Mitchell*, *supra*, the *McElwee* case, and other cases which might be cited,

fully answer this question. Regardless of any obligation, supposed or real, to deliver, the combination of an absolute sale, payment of the price and identification of the thing sold shows a purpose to transfer title at once. And we repeat again that no case can be found holding that with these three essentials present, title does not pass.

The circumstances of the Hopkins purchase demonstrate the reasonableness of the rule of these cases. The Hopkins trustees chose not to defer taking title until delivery of the bonds, preferring to pay for them and "take them up" in advance of delivery, so that they might receive the income produced by the bonds. The Morris Company acquiesced in this as shown by their book entries, and set the bonds apart and identified them as property of the Hopkins estate. If we are to attribute to these acts their ordinary and usual meaning, surely it cannot be doubted that both parties intended the ownership of these bonds to change when they were thus paid for and set aside. In this situation the rule of the Federal cases cited furnishes a safe guide for the disposition of this case. Payment of the purchase price with accrued earnings added, was combined with a complete identification of the property sold. An intention to transfer title immediately was clearly evidenced and the supposed obligation to deliver is without significance.

3. The case has been discussed thus far as if the Hopkins purchase may have included an obligation

on the part of the Morris Company to make delivery of the bonds at Lock Haven. We shall briefly review the circumstances which make clear, as we think, that no such obligation was intended by the parties to be imposed upon the Morris Company.

The basis for this claim of the trustee in bankruptcy is the statement which appears in the letter written by Mr. Glenn of the Morris Company to Mr. Shaffer at Lock Haven, dated December 10, which reads as follows:

"The bonds above mentioned are to be delivered to you about December 23 or 24, and we are to send the same by registered mail insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pennsylvania."

The District Court's memorandum (Record, p. 33), says that:

"The contract is contained in the letter of the bankrupt to Mr. Shaffer of December 10, and his reply thereto."

And the court says that:

"It is therefore quite clear that it was the intention of the parties that the bonds were to be forwarded by the seller by registered mail to the buyer at Lock Haven, Pennsylvania."

From this premise the conclusion is drawn that the title would not pass until the bonds had thus been forwarded.

The record clearly indicates that the Morris Company's letter of December 10 was not intended to be a reduction of the contract to writing; and the

oral negotiations, and particularly the memoranda made by Mr. Glenn for the Morris Company during the negotiations of December 9 must be resorted to as well, in order to determine what the parties intended on the subject of delivery. A writing which bears upon a transaction theretofore orally made, even though sufficient under the statute of frauds to bind the parties signing it, is not to be taken as the complete exposition of their intentions unless the writer and the addressee intend that this shall be so.

Wigmore on Evidence, Secs. 2429, 2430.

Jones on Construction of Contracts, Sec. 134.

Bouchet v. Oregon Motor Car Company, 78 Ore. 230.

The following statement of the rule by Jones on Construction of Contracts (Section 134), is adopted by the Oregon Supreme Court in the *Bouchet* case:

“The test of the completeness of the writing, proposed as a contract, is the writing itself. If this bears evidence of careful preparation of a deliberate regard for the many questions which would naturally arise out of the subject matter of the contract, and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically examined in the light of its surrounding cir-

cumstances with a view of determining whether it is a memorial of the transaction."

Therefore if the Morris Company's letter of December 10 was not intended as a memorial of the transaction, the court is not limited to it and to its answer in ascertaining what obligations the parties intended their contract to impose. On this point, it should first be noted that the oral negotiations were conducted for the Hopkins Estate by Mr. Hopkins of Spokane. He it was who made the purchase, conditioning it only upon the approval of his co-trustee. When an agreement was reached on the afternoon of December 9, Mr. Hopkins directed Mr. Glenn to forward to Mr. Hopkins' co-trustee, Mr. Shaffer, a description of the bonds, together with the legal opinion of counsel covering each issue, explaining that Mr. Shaffer "always had approved my selections, and I would send him a list—that inasmuch as we were acting as co-trustees, I wanted him to have a list of the bonds and the legal opinion on the bonds." (Record, p. 151.) Mr. Hopkins himself sent to Mr. Shaffer immediately a list of the bonds selected so that they might be checked against the list to be furnished by Mr. Glenn.

Thus it appears that as between the parties to the oral negotiation on December 9, there was no thought of reducing the contract to writing; and the letter which was written the next day by Mr. Glenn of the Morris Company was merely a compliance with Mr. Hopkins' direction to place in Mr. Shaf-

fer's hands information regarding the bonds selected. There was no intention to have this letter incorporate exactly all of the terms and conditions of the contract of purchase. This is evidenced also by the fact that the Morris Company did not furnish to Mr. Hopkins a copy of the letter so written to Mr. Shaffer. (Record, p. 144.) Mr. Hopkins had made the deal and if it was his intention that the Morris Company should reduce the bargain to writing, without doubt he would have insisted that a copy of the writing be placed in his hands.

The purpose of the letter of December 10, as already stated, was to transmit to the co-trustee at Lock Haven a list of the bonds purchased, information regarding their worth and the legal opinions on the validity of each issue; what was intended was to secure approval not of the *terms* of the purchase, but of the decision to take the particular bonds listed. It follows that in order to ascertain what obligations the parties intended to assume, recourse must be had not only to the letter thus written and its reply, but also to the oral negotiations of December 9.

When the selection of bonds was made by Mr. Hopkins on December 9, he advised Mr. Glenn that the Hopkins Estate had an acceptance coming due about December 23 or 24, and that he proposed to take up the bonds at that time. Mr. Glenn suggested that the bonds could be forwarded to Lock

Haven with sight draft attached, but Mr. Hopkins declined that offer and stated that:

"I want to send the money here and take the bonds up here." (Record, p. 142.)

If the court will examine the memorandum of the sale made by Mr. Glenn on December 9 (Petitioners' Exhibit 6, Record, p. 177), full corroboration will be found for the testimony of the two men on these points. Upon Mr. Hopkins' statement of his desires regarding payment and disposition of the bonds, Mr. Glenn wrote down:

"Will arrange to take up about Dec. 23-24.

"Make all statements to Lockhaven. Send copy to Spokane. He will send check to cover.

"Send circular and copy of attorney's opinion.

"Get off tomorrow.

"I. A. Shaffer, Jr., Lockhaven, Pa.

"Ship bond to Est. of A. H. Hopkins, Lockhaven, Pa."

This memorandum summarizes all that was said on the subject of payment and taking up of the bonds, and their delivery; and we are to determine whether the directions thus given and accepted contemplated an obligation on the part of the Morris Company to lay down the bonds at Lock Haven, Pennsylvania, and retain title to them until then, or whether the real intention was to transfer ownership and the right to the earnings of the bonds, by the act of "taking them up" when the purchase price should be paid and then to have the Morris

Company place them in the mail registered and insured, addressed to the Hopkins Estate at Lock Haven.

Surely a seller of personal property can accept directions of the buyer, after he has bought and paid for the property, as to where it is to be sent, particularly where the inexpensive mail service is to be used, without incurring an obligation under which the seller would remain responsible for the property until it reached the hands of the buyer. Transactions of this kind are numerous in ordinary business life. No question of transportation expense is involved, and the buyer either holds his money and the property is sent him C. O. D. or through some bank with draft attached, or he sends his money on, *so as to become the owner immediately*, and gives directions as to what disposition he wants the seller to make of the property acquired. In the latter case, the service required of the seller—preparation for mailing, registering, and even insuring, according to the practice of bond houses, is merely the customary service incidental to the sale, (Record, p. 161), and imports no obligation to deliver which might defeat the evident intention to pass title at once.

The Morris Company's letter of December 10, taken in conjunction with the memorandum of Mr. Glenn made December 9, and his explanation of the matter on the witness stand (Record, pp. 158, 163),

show that the Morris Company shared Mr. Hopkins' understanding of the transaction in this respect. There was no thought on the part of the Morris Company that the bonds were to be set down in Lock Haven by December 23 or 24, and no attempt was made to forward them so that they would arrive at that time. Again, the statement explaining the manner of sending the bonds is not consistent with the idea that the Morris Company was assuming responsibility for the delivery. If the latter had been true and the Morris Company was to be responsible for the bonds until they reached Lock Haven, the Hopkins Estate would not have been particularly interested in the fact that they were to be registered and insured during transportation.

But for the thoughtless selection of the term "to be delivered" in the letter of December 10, it is doubtful if this theory of an obligation to deliver would ever have been suggested. It is perfectly clear from the record that the reference to *delivery* December 23 or 24 referred not to the change of physical possession of these bonds, but to the payment of the purchase price and the then change of ownership. The language used by Mr. Hopkins and written in Mr. Glenn's memorandum said that the buyer was "to take up about December 23-24." The date specified was the time when the Hopkins Estate would be prepared to consummate the transaction; and it was expressly understood that the purchase was to be concluded at Portland by the

forwarding of the money from Spokane to Portland instead of at Lock Haven by the shipment of the bonds with draft attached. Mr. Glenn in transmitting the list of bonds and information regarding them to Mr. Shaffer added the information given him by Mr. Hopkins that the purchase was to be concluded by December 23 or 24; and that when it was so concluded, the Morris Company was to mail the bonds to the Estate's office at Lock Haven. This was all that was meant and all that could be meant by the statement in the Morris Company's letter that the bonds were "to be delivered" by December 23 or 24.

With this understanding of the transaction, the reference in the letter of December 10, to the shipment of the bonds by "registered mail, insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pa.", and the instructions given in the answering letter of Mr. Shaffer to "ship the bonds described in your letter to us" amount to no more than the direction of the buyer as to the disposition to be made of the property purchased. As the record shows, Morris Brothers commonly looked after registering and insuring bonds forwarded on behalf of customers. It was the universal practice to register and insure all bonds mailed (Record, pp. 113, 161-162). This service involved little expense and its assumption by the Morris Company has no significance. Mr. Hopkins' instructions were simply

that the bonds were to be sent to the Hopkins office at Lock Haven. There was no stipulation or condition imposed on the Morris Company of obligation to assume responsibility for the transportation of the bonds to destination. The parties unquestionably contemplated simply the usual transmission of the bonds by mail after they were paid for and after they became the property of the Hopkins Estate.

A contrary view would make it impossible for a buyer of bonds to have the bonds he had purchased (after they were fully paid for), sent to him or elsewhere through the mail without danger of defeating the very purpose intended by the payment of the price. If the bonds were scarce, it might be of greatest importance that ownership should be secured by forwarding the purchase price at once; and it is a strange rule which would deny that right of ownership merely because it happened to be convenient to have the bonds forwarded by mail to another destination.

The chief reliance of the trustee in bankruptcy is this supposed obligation to turn over the bonds to the Hopkins Estate at Lock Haven. The theory that such an obligation was a part of the sale contract does violence to the clearly indicated intention of the parties. The "delivery" contemplated for December 23 or 24 was the consummation of the sale by the payment of the price; and this actu-

ally occurred on December 22. The forwarding of the bonds to Lock Haven was to follow this delivery or "taking up" of the bonds, and there was no term or condition of the contract requiring delivery at Lock Haven.

II.

The trustee in bankruptcy contends that there was not a sufficient segregation of the bonds to accomplish an appropriation to the contract, and that what was done in this respect was not assented to or authorized, expressly or impliedly, by the Hopkins Estate.

1. It is not denied that the Morris Company actually set aside certain bonds on account of the Hopkins purchase and labeled these bonds with the name "Hopkins" and made entries on its books of account which (as we think) show that the Morris ownership ended December 22. It is suggested, however, in support of the first of these two objections, that the sale was not one of specific bonds, but of a number of bonds of a certain kind and that the Morris Company, after the segregation which took place, was at liberty to make substitutions at will, subject only to the requirement that the specified number of bonds of the description ordered be delivered.

Baars & Company v. Mitchell, supra, and McElwee v. Metropolitan Lumber Company, supra,

completely answer this suggestion. In each of these cases, no specific lumber was bought and there was nothing to prevent the seller, after the lumber had been placed in the piles, from making substitutions or changes; and if the substituted lumber conformed to the contract requirements, obviously the purchaser would make no complaint. In every case of the purchase of one or more of a number of similar articles, the seller, as long as the property remains in his possession, can make changes without possibility of complaint by the buyer. But this cannot defeat the intention of the buyer to acquire ownership of the purchased article at once where he pays his money for that express purpose. This is illustrated by *Mitchell v. LeClair*, 43 N. E. (Mass.), 117, involving the sale of sixty tubs of butter out of a large quantity, all of like quality, and by the English and American cases collected in 24 Ruling Case Law at page 27. In *Mitchell v. LeClair*, the seller set aside the number of tubs of butter called for by the buyer's order, marking each with the buyer's name, and sending him at once a bill calling for immediate payment. In a frequently cited English case (24 Ruling Case Law, p. 27), the sale was of barley, and the buyer sent the seller sacks for use in delivering. The seller filled the sacks, but because of impending bankruptcy, did not deliver and turned the barley back. In both of these cases, the title was held to have passed, although the sellers, as in the *Baars case* and the *McElwce case*, had

every opportunity of making changes or substitutions.

If because of the seller's opportunity after segregation and before delivery to make changes, the segregation is to be held revocable and therefore not binding, it results that in no such a sale can the buyer secure title by payment of the price, unless he takes possession or in some manner makes it impossible for the seller to effect changes in the property set aside. This is not the law. The trustee in bankruptcy (and the District Court), have confused the opportunity of making changes in the segregated property with the right to make such changes. When the buyer pays the price and directs the seller to make disposition of the property purchased, the seller must necessarily take out of the stock of similar articles the number called for by the purchase. When he does this, he has made the necessary appropriation. Thereafter the property set apart belongs to the buyer, but so long as it remains in the seller's possession, obviously he has the opportunity (but not the legal right), of making substitutions. As a practical matter, the buyer could have no complaint to make if the substituted property be identical in character and value with that taken back. To this extent the segregation is not irrevocable. Nevertheless, it is a specification of the goods to which the contract is to attach. The Supreme Court of the United States in *Hatch v. Standard Oil Co.*, 100 U. S. 124, 136, said:

“After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied.”

Williston on Sales, Sec. 274, notes that the word appropriation is not so well suited to the purpose as the word specification. He says:

“Specification is the proper word to indicate merely that definite goods have, either by the contract or subsequently, been fixed upon as the subject matter of the sale.”

We can find nothing in the fact that the Morris Company could have made changes (although none were made), after the segregation, which destroys the significance of the clear and unquestioned specification of the bonds set aside for the Hopkins purchase; and the *Baars* case in the Fifth Circuit and the *McElwee* case in the Sixth Circuit, and many other English and American cases establish that a specification of the property, although an opportunity for change remains in the seller, passes title.

It is to be noted, too, that the parties to the Hopkins purchase in fact understood that they were making a bargain and sale of specific bonds. \$31,000.00 out of the \$60,000.00 covered by the contract comprised the only bonds of the particular issue and maturity owned by the Morris Company at the time. As to all the rest, the Morris Com-

pany claimed it owned or controlled (and with the exception of the Bay City bonds, did own or control), a certain number of the issues described; and the Hopkins Estate was sold three out of four, or four out of five of each of the issues or maturities thus owned or controlled.

As to the \$31,000.00 first referred to, apparently there was no necessity for any specification. The Morris Company owned fifteen Fremont & Madison County Joint School District bonds. This was the Morris Company's entire holding and by the contract with the Hopkins Estate, it sold all of these bonds. Certainly when the Hopkins Estate paid over the purchase price (if not at the moment the approval by Mr. Shaffer made the sale absolute), the title passed. It may be that there were other bonds of this issue on the market so that the Morris Company could have retained the fifteen on hand December 9 and could have filled the Hopkins contract by outside purchases; and the Hopkins Estate would have been none the wiser. But the fact remains that the Morris Company sold the Hopkins Estate the fifteen bonds it had advertised as on hand and for sale, and the possibility of making substitutions could not affect the rule of law applicable. In point of fact, the record does not disclose whether there were other such bonds on the market and whether there was any such possibility of effecting changes. In any event,

there is no reason to doubt the intention of the parties that specific bonds were sold. As to the remainder of the purchase, the Hopkins Estate bought some, in fact nearly all, of the particular bonds advertised and held for sale by the Morris Company.

We find it difficult in this situation to agree with the District Court's statement that specific bonds were not sold but that the Morris Company was merely to supply a number of bonds of certain issues and maturities. However that may be, appropriation to the contract (under the rule of the *Hatch* case), was all that was necessary to make the sale complete. To accomplish this appropriation, the Morris Company specified the particular bonds out of those on hand (or collected in), which were to be used to fill the Hopkins order. Whether after the purchase price was paid and the parties by their actions showed an intention to change the ownership, the Morris Company could have made substitutions without criticism from the purchaser, seems unimportant. All of the elements necessary to a complete transaction had been supplied by the definite act of specification combined with the receipt of the purchase price. Under *Hatch v. Standard Oil Company* and other cases above cited, the transaction was consummated and the title passed.

2. The claim that there was no assent by the Hopkins Estate to the act of the Morris Company in specifying the particular bonds for appropriation to the contract needs but little comment. On the question of authority to make the appropriation, Williston on Sales (at page 382), says:

“The buyer rarely expresses his consent to an appropriation in definite words. On the contrary it is necessary to resort to inference from the terms and circumstances of the bargain.”

The act of setting apart the bonds and their identification was necessary before the Morris Company could mail them, after they had been paid for, to the office of the Hopkins Estate at Lock Haven; and both trustees had given explicit directions to the Morris Company to send the bonds to Lock Haven as soon as the purchase was consummated. After the bargain was made, December 9, Mr. Hopkins did not contemplate returning to Portland, either at the time of the payment of the price or at any time before the bonds were to be forwarded, and he and Mr. Shaffer both directed the Morris Company to send on the bonds to Lock Haven. The segregation of the bonds, their identification as Hopkins bonds, and the act of collecting them into one package were all necessary steps in the carrying out of the directions given by the purchaser. Payment of the purchase price alone would be sufficient ordinarily to authorize the seller to set aside the property to be used in fulfillment of the contract;

particularly where there was no choice to be exercised as to what particular articles out of a number all alike should be used. Here there was not only the authority given by the payment, but there was an express direction to the seller which of necessity required it to select and set apart (where less than all of the bonds owned were purchased), the property to be appropriated to the contract.

If any authority is needed for a proposition so clear, it is furnished by *Baars & Company v. Mitchell*, *supra*, and *McElwee v. Metropolitan Lumber Company*, in both of which cases the appropriation was by the seller without any more authority from the buyer than that inferred from the circumstances of the contract. Indeed, almost any one of the American or English cases cited by the text writers could be selected at random and less authority would be found for the seller's act of segregation than appears in the case at bar. An illustrative American case is *Mitchell v. LeClair*, 43 N. E. (Mass.), 117. This involved a sale of butter out of a larger quantity owned by the seller and the seller's authority to segregate was given only by the buyer's telegram accepting the offer to sell. The court said:

“Upon the receipt of the defendant's telegram accepting their offer, they were impliedly authorized, as the defendant's agents, to set apart and appropriate to him the goods called for by the contract. This they immedi-

ately did, weighing the butter, setting it apart, and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked, 'cash on demand.' This completed the sale and passed the title." (Citing cases and also citing Benjamin, Sales (6th Am. Ed.), 294-298).

We repeat that in reviewing the acts of the buyer and the seller in this case, the court cannot but give to their acts that meaning which would ordinarily be inferred from any like business transaction. It can hardly be doubted that nowhere but in a hotly contested law suit with property of substantial value at stake, would any one assert that a buyer, who had paid his money and had directed the seller to forward the goods purchased, had not authorized the seller to select and set apart the property purchased. The assertion that authority was withheld is almost absurd when made with reference to bonds differing in not the slightest particular one from another. The Hopkins Estate bought three of the four Rigby bonds, 1932 maturity, owned by the Morris Company. Is it conceivable that the Hopkins trustees had a choice as to which three out of bonds Nos. 9, 10, 11, and 12, they wanted? To say that they did have a choice and that they did not authorize a segregation by the seller does violence to the plainly expressed intention; and in the circumstances, it is difficult to take the argument seriously.

No direct authority or assent is ever thought of by the buyer where the sale is of a given quantity of goods of a standard or certain quality. Direct authority from the buyer is contemplated only when the sale is of one or more of a number of articles regarded by the parties as differing in value.

Johnson v. Hibbard, 29 Ore. 184.

Chapman v. Shepard, 39 Conn. 413.

Lingham v. Eggleston, 27 Mich. 324.

24 Ruling Case Law, Sec. 285.

These cases are authority for the rule that where the sale is of a specified quantity of articles out of a larger quantity of the same kind, character and value, any act of the seller in marking or identifying the property is a sufficient specification to supply the element needed to make the transaction a completed sale. As to such of the Hopkins purchase as took less than the entire holding of the Morris Company, obviously the Hopkins Estate was not concerned with the question of which three out of four bonds, all exactly alike except as to the bond numbers, were to be supplied. The Hopkins trustees paid for the bonds and directed the Morris Company to send on three out of the four; and this surely gave abundant authority to the Morris Company to select the particular bonds to be appropriated to the contract.

The decisions of the Court of Appeals in the Fifth and Sixth Circuits, founded as they are on the decision of the Supreme Court of the United States in *Hatch v. Standard Oil Company, supra*, state the rule which should govern the disposition of this case. According to the principle they lay down, the combination of a sale absolute in terms, payment of the purchase price, and identification of the property sold demonstrates an intention to pass title without waiting for delivery, even in cases where the seller has obligated himself to deliver; and no American or English case can be found to the contrary. In the case at bar, these essentials are clearly present. In addition, the adjustment of the accrued earnings of the bonds as of the time of the payment of the purchase price, removes any doubt of the intention of both to transfer title at that time. This intention was carried out by the authorized specification by the seller of the bonds appropriated to the contract. If there was an obligation on the part of the seller to make delivery (and clearly there was no such obligation), its significance was outweighed by the circumstances thus demonstrating the intention to transfer title before delivery.

The intention thus indicated should control. The trustee in bankruptcy stands in the shoes of the Morris Company. If bankruptcy had not ensued, the Morris Company certainly could not have as-

serted title to the bonds once they were paid for and appropriated to the contract; and the trustee in bankruptcy should not be permitted to retain the bonds which the Morris Company clearly understood were the property of the Hopkins Estate.

CAREY AND KERR,

CHARLES A. HART,

Attorneys for Appellants.

IN THE
**United States Circuit Court
of Appeals**
For the Ninth Circuit

**WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as
Trustees of the Estate of A. C. HOPKINS, Deceased**
Appellants

v.

**EARL C. BRONAUGH, as Trustee in Bankruptcy of the
Estate of MORRIS BROTHERS, INC., Bankrupt**
Appellee

Brief of Appellee

Upon Appeal from the United States District Court
for the District of Oregon

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Attorneys for Appellants

JOHN P. WINTER
Attorney for Appellee

FILED

W. D. MORGENTHAU

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IN THE
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WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as
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Appellants

v.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the
Estate of MORRIS BROTHERS, INC., Bankrupt
Appellee

Brief of Appellee

Upon Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

This proceeding was instituted to reclaim \$50,000
worth of bonds from the Trustee of the bankrupt.

On December 27th, 1920, Morris Brothers, Inc., were
adjudicated a bankrupt. The Company's assets
amounted to about \$1,200,000. Its liabilities aggregated
over \$2,000,000. The total claims of general

unsecured creditors exceed \$1,800,000. Nearly all of these claims represent cash paid to the bankrupt for bonds that were to be delivered according to the terms of certain certificates issued by the corporation commonly known as interim certificates. In substance these certificates provide that Morris Brothers, Inc., will deliver bonds of a certain kind with coupons attached from a certain date "if when and as said bonds are issued and delivered" to the corporation, and in the event that the bonds would not be issued and delivered the corporation will redeem the certificate by repaying the purchase price with certain interest.

On December 9th, 1920, Mr. William P. Hopkins, a co-trustee of the Estate of A. C. Hopkins, deceased, orally placed an order for the purchase of \$60,000 worth of bonds with Morris Brothers, Inc. The order was tentative only and was subject to the approval of I. A. Shaffer, the other trustee, who resides at Lock Haven, Pa.

On the following day, December 10th, 1920, Morris Brothers, Inc., wrote a letter to Mr. Shaffer at Lock Haven, Pa., as follows:

"Mr. Wm. P. Hopkins was in yesterday and subject to your acquiescence on the purchase of said bonds placed with us an order for the following:" (Here follows a description of bonds of various municipalities, giving the amounts, the rate of interest, date of maturity and price, but not specifying any specific bonds.) The letter then states: "The bonds above mentioned are to be delivered to you about December 23rd or 24th,

and we are to send the same via registered mail insured, addressed to the Estate of A. C. Hopkins at Lock Haven, Pa." (Record pp. 129 and 130.)

On December 15th, 1920, Mr. Shaffer acknowledged receipt of the above letter, approved the purchase and directed as follows:

"You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins." (Record p. 132.)

On December 20th, 1920, Mr. William P. Hopkins wrote a letter to Morris Brothers, Inc., at Portland, enclosing check as Trustee of the A. C. Hopkins, Estate for \$61,000 "to apply on a purchase of municipal bonds made from you on December 9th." This letter further states as follows:

"Upon receipt of this check, please send me an exact statement of our account and if there is any considerable balance due you I will send you another check. If there is no considerable balance I will ask you to send the securities on to Mr. Shaffer at Lock Haven and let him remit any small balance direct." (Record p. 132.)

This letter was received about December 22nd, 1920, and on this date a letter was written by Morris Brothers, Inc., to William P. Hopkins acknowledging receipt of the check for \$61,000 and enclosing an itemized statement covering the purchase. On account of the bankruptcy the letter was not mailed. This letter contains this statement:

"If you find the same in due order kindly

advise us and we will make prompt shipment to Mr. Shaffer at Lock Haven, Pa." (See record p. 136.)

The record discloses that at the time that the order for the bonds was placed Morris Brothers, Inc., had in stock and available for delivery, answering the description contained in the order, bonds amounting to about \$20,000. The corporation had other bonds, but they were hypothecated with various banks and \$10,000 of the bonds covered by the order were not owned by the corporation at the time the order was placed and were never acquired by it. These were the Port of Bay City Bonds. After the receipt of the order and confirmation thereof, the bankrupt began to assemble the bonds to fill the order and by the 24th of December \$50,000 worth of bonds answering the description contained in the letter of December 10th had been assembled and placed in an envelope with the name "Hopkins' Estate" written across it, preparatory to delivering the same to the purchaser at Lock Haven, Pa. It was the intention of the bankrupt not to deliver the bonds until it had secured the Port of Bay City Bonds amounting to \$10,000. This was the condition of affairs when the corporation was adjudicated a bankrupt.

This cause came on for hearing on April 1st, 1921, at which time evidence was offered by the claimant and the trustee and the cause was submitted. On April 18th by agreement of counsel further testimony was offered on behalf of claimant. The matter was then submitted to the Referee on briefs, and the Referee decided the cause in favor of the Trustee. Upon re-

view the decision of the Referee was sustained by the District Court and thereafter Counsel for claimant filed a petition to re-open the proceedings and to take further testimony. This petition was granted and the cause was again referred to the Referee. Additional testimony was offered by claimant, mainly upon the point of delivery. The cause was again argued before the Referee, who upon the second hearing sustained his former ruling and denied the petition. Upon review to the District Court this decision of the Referee was again upheld.

ARGUMENT

The question involved in this appeal is: Did the title to that part of the bonds covered by the order which had been assembled pass to claimant? No claim is made that the Hopkins Estate is entitled to recover all of the bonds embraced in the purchase agreement. The order covers \$10,000 Port of Bay City Bonds. The bankrupt never acquired any part of Bay City Bonds and therefore, of course, could not transfer title to any part of the Bay City Bonds to claimant.

The question as to whether or not title passes is primarily one of the intentions of the parties to be derived from the terms of the agreement itself and the circumstances surrounding the transaction.

24 R. C. L. 15 Section 275,

U. S. vs, Woodruff, 22 Wallace 180,

22 L. Ed. 863, 868,

Barber vs Andrews (29 R. I. 51), 26 L. R. A. (N. S.) p. 1 to 7, note 4.

What was the intention of the parties to this proposed sale? The terms of the agreement do not specifically provide for the passing of title. As to whether or not title actually passed must therefore be determined from the conditions and circumstances surrounding the transaction. The case was twice heard by the Referee and was twice considered by the District Court. Both the Referee and Court after considering all of the testimony and circumstances surrounding the entire transaction determined as a fact that it was not the intention to pass title until all of the bonds embraced in the order were available for delivery and delivery was made. Counsel for appellants argues that the Referee and Court both erred in not finding as an affirmative fact that the title to those bonds which had been segregated passed to the buyer. His contention is that the terms of the agreement and the surrounding circumstances proved that it was the intention to pass the title to the bonds which were available for delivery. This contention is based upon the familiar principle—that

1. Where a sale is absolute in terms, and
2. Where the property sold has been identified, and
3. Where the purchase price is paid the title to the property passes in the buyer and this regardless of any obligation on the part of the seller to make delivery of the property to the buyer.

The above principle of law is generally applied by the Court in the case of a sale of specific property.

This rule itself does not change the primary principle that the question is one of the intention of the parties. The rule has not the same application in cases where the contract of sale deals not with certain specified property but with property of a certain kind only.

It must be remembered at the outset that the agreement as shown by all of the testimony was only an executory agreement to sell not specific bonds but **bonds of a certain kind**. As is stated by Judge Bean in his opinion on review (Record p. 33).

“It is to be observed the contract was not for the sale and purchase of certain specific bonds, but only of bonds of certain issues, denomination, maturity and rate of interest. The delivery by the seller of any bonds whether then owned or afterward acquired, answering this general description would have been a compliance with the contract. The selection by the seller of the particular bonds which it intended to deliver under the contract was not irrevocable. Notwithstanding such selection, it could thereafter have substituted others of like kind. All the buyers could demand was that when the time for performance arrived, bonds of the description and kind specified in the contract be delivered.”

In the case of

H. Baars & Co. vs Mitchell, 154 Fed. 322-323-325.

cited by appellant the Court had before it a contract

of sale covering specified property described in the contract. The contract stated:

“Confirming verbal understanding with you I confirm sale to you of all lumber of the following description now on hand at the mill of R. R. Cowan, Cowan, Fla., and all that he will manufacture during the next six months from this date, and at the prices named. (Setting forth the prices.”)

In reviewing the decision of the lower Court the Court after quoting from Hatch vs. Oil Co., said, “In the light of this high authority, it seems that in the present case all the requisites to a binding sale were complied with. There was an undisputed agreement for one party to sell and another to buy. The thing was **specially designated, described and segregated**. The price was fixed and payments were made as agreed.” The Court further stated:

“Although the agreement may have been to some extent executory, it being for the purchase and sale of all lumber of a certain description ‘now on hand at the mill of R. R. Cowan, Cowan, Fla., and all that he will manufacture,’ during a specified period, yet when the lumber was manufactured and segregated and the **bills of sale with full detail and description were presented and accepted and payment made according to** the contract there was a complete sale of the property designated in the bills and the title thereto at once vested in Baars & Company.”

In the Baars case the particular lumber was not only

specified in the agreement, but it was manufactured and segregated and thereafter bills of sale "with full details of description were presented and accepted" and payment made according thereto. From these facts and circumstances the Court found that it was the intention under the agreement that the title to the lumber should pass to the purchaser after it was manufactured, segregated and accepted and the bills of sale were rendered and the purchase price paid. The facts in that case, as we shall point out later, differ materially from the facts in the case at bar. No sale of specific property was contemplated by the agreement in the Hopkins case. The bonds were not segregated with the purpose of passing title. The purchase price was not paid with any understanding or knowledge that the bonds had been segregated.

The case of McElwee vs. Metropolitan Lumber Company, 69 Fed. 302-305, was one involving a contract for the sale of all of the lumber to be manufactured by the defendant Company during a given period. When the product of a particular month was completed it was inspected, measured and accepted and plaintiff made its notes in payment thereof. The Court said:

"To say title remained with the vendor after the lumber had been appropriated to the contract and **accepted by the buyer**, and after the negotiable notes of the vendee had been delivered in settlement, would leave the vendor liable for loss by fire or other casualty, and the vendee without security for the payment he had made."

It will be noted that in this particular case the lum-

ber was not only segregated or appropriated for the purchaser, but this was done with his assent as the lumber was accepted by the buyer. In the present case certain bonds were assembled for future delivery, but this was not done with the express or implied assent of the buyer and it was not done for the purpose of passing title to the buyer. The Court will note that all of the decisions referred to by counsel are either cases where the contract of sale referred to specific property, or where the property was afterwards identified and set aside with the assent of the buyer.

Each case must be governed by its own facts and the circumstances surrounding the same. It is always a question of what was the intent of the parties.

In 1919 Oregon adopted the Uniform Sales Act. This act provides as follows:

“1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such times as **the parties to the contract intend it to be transferred.**”

“2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the trade.” (See Section 8181 Olson’s Code.)

Then the act lays down certain rules for ascertaining the intention of the parties, it says:

Unless a different intention appears the following

are rules as to the time at which the property in the goods is to pass to the buyer:

Rule 1 is as follows:

“Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.”

Rule 2 is:

“Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done.”

Rule 4 is:

“(1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

“(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appro-

priated the goods to the contract, except in the cases provided for in the next rule and in Section 8183. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents."

Rule 5 is:

"If the contract to sell requires the seller to deliver the goods to the buyer or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

Rule 3 is omitted because its terms clearly have no application to the present case.

It is respectfully submitted that the present case is controlled by Rule 5, because the terms of the contract require Morris Brothers Inc., as a seller to deliver the bonds to the buyer and Morris Brothers, Inc., agreed to pay the costs of transportation. After Mr. William P. Hopkins had orally given a tentative order for the \$60,000. worth of bonds and on December 10th Morris Brothers, Inc., wrote to Mr. Shaffer, the other trustee of the Hopkins Estate at Lock Haven, Pa., as follows:

"Mr. William P. Hopkins was in yesterday and subject to your acquiescence on the purchase of said bonds placed with us an order for the following:"

then follows a description of a certain kind of bonds, not of specific bonds. Then the letter states:

“The above mentioned bonds are to be delivered to you about December 23rd or 24th, and we are to send the same via registered mail insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pa.” (See Record pp. 129 and 130).

This letter was answered by Shaffer in behalf of the Hopkins Estate. (See Record p. 132). Mr. Shaffer’s letter approved the purchase and directed—

“You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins.”

Mrs. Granning, a witness called by claimant, testified as follows:

Q. (By MR. HART): You were acting in what capacity with Morris Brothers, Inc., prior to the closing of the doors, in December, 1920?

A. I looked after the shipping out of securities and wrote letters regarding sales and different transactions connected with the sending out of bonds and securities. (See Record p. 108)

On cross examination this witness testified:

Q. Did you look after the insurance?

A. No, our office boy looked after that. I checked it up and signed the letters.

Q. If these bonds had been shipped you would have sent them by registered mail?

A. Yes.

Q. Insured?

A. Yes.

Q. With loss, if any, payable to whom?

A. To Morris Brothers because we were responsible for the bonds until they arrived at their destination.

Q. Did you pay the insurance charges?

A. It was charged to us. (See Record p. 113.)

This testimony of Mrs. Granning, who looked after the shipping out of securities and wrote letters regarding sales, etc., clearly indicates that Morris Brothers, Inc., had an understanding that under the agreement with the Hopkins Estate it was directed to ship the bonds to Lock Haven, Pa., was responsible for the arrival of the bonds at that place and it is likewise evident that the Trustees of the Hopkins Estate also had the same understanding, to wit: That Morris Brothers, Inc., were to deliver the bonds to them at Lock Haven. It is inconceivable that Mr. Shaffer and Mr. Hopkins, men of affairs, who have charge of a large estate, would have purchased from Morris Brothers, Inc., securities worth \$60,000. with the understanding that the title to these securities was to pass to the Hopkins Estate in Portland, without having made arrangements for the protection of the Estate, while the bonds were in transportation. Who would have suffered if the bonds had been mailed to the Hopkins Estate and the mails had

been robbed in transit? They were to be insured as the property of Morris Brothers, Inc., while in transit and not as the property of the Hopkins Estate. Could it have been claimed by Morris Brothers, Inc., that the loss fell on the estate? Could it have been contended by the Insurance Company that at the time the insurance was taken Morris Brothers, Inc., had no title to the property insured and therefore the Insurance Company was not liable?

The District Court granted a re-hearing for the purpose of giving claimant an opportunity to offer additional testimony upon the point of delivery, and the testimony of Mr. William P. Hopkins and Mr. Glenn was offered (See Record p. 141)

Mr. Hopkins testified as follows:

Q. Now, Mr. Hopkins, what, if anything, was said at this time by you and Mr. Glenn or in conversation with Mr. Glenn as to the time or manner of payment and the time or place of delivery of the bonds?

(Referring to the conversation between Mr. Glenn and Mr. Hopkins, which occurred on the 9th of December.)

(This question was objected to for the reason that it came within the condemnation of the statute of frauds and could not be received to vary the terms of the letters.)

A. I said to Mr. Glenn that we would have some funds in about the 23rd or 24th of December

with which to take up those bonds, and Mr. Glenn said, "Do you want the bonds sent to Lock Haven with sight draft attached?" and I said, "No, I don't. I want to send the money here and take the bonds up here" and he said, "All right." (See Record p. 142)

On cross examination the witness was asked—

Q. Do you remember when you had the conversation with Mr. Glenn, saying that these bonds should be sent to Lock Haven the same as the other bonds?

A. I do not remember saying that.

Q. Do you say that you did not say that?

A. I do not remember whether anything was said about it or not.

Q. Upon that point you have no recollection one way or the other?

A. No.

Q. And if Mr. Glenn should testify that you had that conversation, so far as your memory goes that might be right?

A. If he should testify positively that he remembers I said that I would think there would be no doubt about it.

Q. And when you said you would send the money and take the bonds up here, you meant that they were to be shipped to Lock Haven?

A. No, I did not. I meant that we would take them up here; that they would be paid for here.

(See Record p. 148)

Q. Did you tell Mr. Glenn that you would send the money here and take up the bonds here?

A. Yes.

Q. Just what did you mean by that?

A. Just that; that I would send the money and take the bonds here, in Portland.

Q. And you were not coming here yourself to take them?

A. No.

Q. How were you to take them here?

A. I was to send the money here for the bonds and they were to send them to Mr. Shaffer. (See Record p. 146).

Mr. Glenn who was in the employ of Morris Brothers, Inc., and with whom Mr. Hopkins had the negotiations for the purchase of these bonds testified as follows:

Q. On the second sheet of Claimant's Exhibit 6 you have a memorandum to this effect: 'Ship bonds to Estate of A. C. Hopkins, Lock Haven, Pa.' Is that right?

A. Yes.

Q. And you made this memorandum just as you were talking with Mr. Hopkins?

A. Yes. (See Record p. 165).

Even if we give due weight to the oral testimony offered by claimant touching the question of whether or not the bonds were to be delivered at Lock Haven, the inevitable conclusion must be that the agreement and understanding was that the bonds were to be delivered by Morris Brothers, Inc., to the Hopkins Estate at Lock Haven, Pa.

It must be remembered that Mr. Hopkin's testimony in regard to the delivery of the bonds was given at the re-hearing and after the court had decided that under the agreement as it existed Morris Brothers, Inc., were to deliver the bonds to the Hopkins Estate and that no title passed until delivery was made.

At the trial of this cause counsel for claimant in oral argument and by written brief vigorously contended that the transaction involved was the sale of specific property and that for this reason title passed and cited numerous authorities involving the sale of specific property. His contention was that Rule 1 of the Uniform Sales Act, above quoted, controlled the case. But the contract here is not for the sale of specific goods; it is for the sale of bonds of a certain kind and therefore it is submitted that Rule 1 has no application and that the cases involving the sale of specific property likewise have no application, and it is further submitted that Rule 5 of the Uniform Sales Act governs.

The agreement is evidenced by the letter of December 10th written by Morris Brothers, Inc., to Mr. Shaf-

fer Trustee of the Hopkins Estate and by the reply to this letter written on December 15th. The oral conversation had by Mr. Hopkins and Mr. Glenn on the 9th day of December did not amount to a binding agreement. The understanding was that this oral agreement was tentative, was subject to the approval of the co-trustee. The letter of the 10th written by Morris Brothers, Inc., to the Hopkins Estate "Claimant's Exhibit 1" clearly sets forth the kind of bonds Morris Brothers, Inc., were to sell to the Hopkins Estate, the price thereof and that they were to be delivered at Lock Haven. The offer contained in this letter was accepted by letter signed by Mr. Shaffer, "Claimant's Exhibit 2". Mr. Hopkins in his testimony states that Mr. Shaffer had authority to accept the offer. If the two letters, Claimant's Exhibit 1 and 2 do not constitute a binding agreement to purchase, then no agreement existed between the parties for the purchase of any bonds, for the oral understanding under the statute of frauds could not be enforced.

The two letters show a complete agreement. Every element of an agreement is specifically set forth, in Claimant's Exhibit 1, being the offer and in Claimant's Exhibit 2, being the acceptance. Everything was settled by these two letters, excepting alone the time of payment. The payment was left to Mr. Hopkins the co-trustee. All of the terms are not only incorporated but clearly expressed in these two letters.

The general rule in regard to the admission of parol evidence is ably discussed by Willison on Contracts. The noted author says, Vol. II, Section 633:

“The parol evidence rule does not apply to every contract of which there is written evidence, but ‘only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.’ * * *

Since it is only the intention of the parties to adopt a writing as a memorial which makes that writing an integration of the contract, and makes the parol evidence rule applicable, any expression of their intention in the writing in regard to the matter will be given effect. If they provide in terms that the writing shall be a complete integration of their agreement or that it shall be but a partial integration, or no integration at all, the expressed intention will be effectuated. The parties, however, rarely express their intention upon this point in the writing, and if the court may seek this intention from **extrinsic circumstances**, the very fact that parties made a **contemporaneous** oral agreement will of itself prove that they did not intend the writing to be a complete memorial. The only question open would be whether such a contemporaneous oral agreement was in fact made. Even if the oral agreement is repugnant to the writing, what was orally agreed would be of equal importance with what was written, since its existence would prove that there was no complete integration of the contract in regard to the matter to which it related. The parol evidence rule would then be of importance only as establishing a presumption that prior and contemporaneous oral agreements and negotiations were merged in the writing. But the practical value of the rule would be much impaired if either party

to the writing were allowed to rebut the presumption by proof of any contemporaneous oral agreement. Certainly the law does not permit this. The question arises chiefly where it is asserted not that there is no integration at all, but only a partial integration. It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms. Frequently, it is not necessary inference from the writing itself either that it is a statement of the whole agreement, or that it is not. In such a case it has been held that parol evidence is admissible to show which is the fact. The difficulty with such a principle lies in its application. No written contract which does not in terms state that **it contains** the whole agreement (and few do so provide though it would be generally a wise provision) precludes the possible supposition of additional parol clauses, not inconsistent with the writing. The matter has been well summed up by Finch, J.: 'If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous **oral stipulations** are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon the inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understand-

ing and interpretation it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract.' "

Claimant's Exhibit 1 and 2 evidences a complete contract; contains a complete description of the various kinds of bonds; the net price to be paid therefor; the time and place of delivery, therefore this contract could not be changed or modified by what was said between Mr. Hopkins and Mr. Glenn on the 9th of December and before the letters were written.

But even if the court should take into consideration all of the testimony in regard to the entire transaction the weight of testimony clearly shows that it was the understanding that these bonds were to be delivered by Morris Brothers, Inc., at the risk of Morris Brothers, Inc. to the buyer at Lock Haven, Pa. The transaction was so understood by Morris Brothers, Inc., and was likewise so understood by the trustees of the Hopkins Estate. Morris Brothers assumed the risk of delivering the bonds to Lock Haven. They intended to insure the bonds for the benefit of Morris Brothers and not for the benefit of the buyer.

They did not intend to ship any of the bonds until they had received all of them. On December 22nd, 1920, Morris Brothers, Inc., wrote a letter to Mr. Hopkins at Spokane acknowledging receipt of his letter of December 20th with enclosed check for \$61,000. An itemized statement covering the bonds purchased had been pre-

pared to be sent to Mr. Hopkins with the letter written on December 22nd. The letter stated

“If you find in due order, kindly advise us and we will make prompt shipment to Mr. Shaffer, at Lock Haven, Pa.” (See Record, p 136.)

The enclosure referred to consisted of an itemized statement of the bonds purchased and it covered all of the bonds, not only the \$50,000 bonds which had been assembled, but also a description of the \$10,000 of Port of Bay City bonds which had never been received by Morris Brothers, Inc. (See Trustee's Exhibit A, Record p. 137). According to the itemized statement the total amount of the purchase price of the bonds including accrued interest on the coupons amounted to \$60,176.35, leaving an overpayment of \$823.65. Though this letter and statement were never mailed, they clearly indicated that it was not the intention of Morris Brothers, Inc., to deliver the bonds until after it had acquired the Port of Bay City bonds.

It was the intention to ship not a part of the bonds, but all of them. As stated by Mrs. Gramming in her testimony:

Q. Was it your purpose to secure the Bay City bonds and then ship them all at the same time?

A. Ship them all at once. (See record p. 112.)

According to the letters the bonds were to be delivered at Lock Haven. According to the testimony the charges of transportation were to be paid by Mor-

ris Brothers, and the bonds were to be insured as the property of Morris Brothers, Inc., and for its benefit, and it was not intended that the bonds were to be delivered until Morris Brothers, Inc., had acquired all of them.

It is true as stated by Judge Lurton in *McElwee vs Metropolitan Lumber Company*:

“Undoubtedly, the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery.”

69 Fed. p. 305.

This general rule referred to by Judge Lurton is emphasized by Rule 5 of the Uniform Sales Act.

In the case of

Russell vs Nicoll, 3 Wend. (N. Y.) 112, 20 Am.
Dec. 670-672.

there was an agreement to sell 500 bales of cotton at 16½¢ per pound, the cotton to be delivered at New York by a certain date. Eleven bales of cotton were shipped and arrived in New York, and the purchaser demanded that they be weighed and offered to pay the purchase price therefor, but delivery was refused and the vendee brought an action in trover. The Court held:

“Eleven bales of cotton did arrive within the specified time and defendant refused to deliver

because all 500 bales were not received. Their views of the contract in this particular appear to me to have been correct. The contract was for 500 bales. It was entire. There was no obligation on the part of the plaintiffs to receive a less quantity than the whole, and consequently none on the part of the defendants to deliver less than the whole. The obligation to deliver and to receive must be reciprocal. * * * Apply to this property the test mentioned in the case of *McDonald vs Hewitt*, this being 15 Johns, 349, 20 Am. Dec. 241. **Who would have been the sufferers if the cotton had been lost on its voyage from New Orleans to New York, or while at the latter place before it had been weighed? Beyond all question the loss would have fallen upon the defendant."**

Where the seller agrees to deliver the goods at the buyer's residence or at any other place, it is the seller's duty to deliver according to the contract. Until he has done that the property presumably is not intended to pass.

In the case of

Calcutta Co. vs De Mattos, 32 L. J. Q. B. 322, 335, Cockburn, C. J., said:

"If by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly, the property would re-

main in the seller and the thing would be at his risk."

In the case of

Fabrik vs Basel Chemical Works, A. C. 200-207
Lord Herschell, in speaking of goods ordered to be sent by mail from Switzerland to England, said:

"If the goods were according to the order to be delivered by the seller in England, the sale would not have been constituted and complete in Switzerland. Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser."

The same rule is stated in

24 Am. and Eng. Ency, of Law (2d Ed.), page 1050,

as follows:

"If by the terms of the contract the **seller is required to send, or forward, or deliver the goods to the buyer, the title and risk remains in the seller until the transportation is at an end or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer.**"

citing a number of cases

In the recent case of

Neer vs Lang, 252 Fed. 575-577

the defendant wrote purchaser that he would sell him

20 shares of stock at \$400, and the plaintiff wired: "We accept 20 Saxon at four hundred. Ship with draft attached." The defendant failed to comply and the plaintiff brought action for damages. The Court in dismissing the case said:

"The law implies that the place of delivery of the stock shall be at the place of the seller, nothing appearing to the contrary, that is to say, in this case the place of delivery under said offer as made is Fort Leavenworth, Kansas (being defendant's place of business), but under the acceptance the delivery was to be made at Detroit, Michigan, where plaintiff resides."

The court held that the telegram of acceptance by adding the terms "ship with draft" introduced a new obligation not contained in the offer, obliging the seller to deliver at Detroit, and that the telegram therefore did not constitute a binding acceptance of the offer, and for this reason the defendant (the seller) was not liable.

In the case of

Burn vs Metropolitan Lbr. Co. 107 Atl. 609,

decided in 1919 by the Supreme Court of Connecticut, the plaintiff on May 7th, 1917, ordered from the defendant certain lumber and in the order used the statement, "Ship us transit car containing" etc. The order was accepted by the Lumber Company by subscribing its acceptance to the order. The defendant failed to deliver the lumber and the plaintiff brought suit for damages. The Court said:

“The action being for damages for failure to deliver a quantity of lumber, the first question is, where was the lumber to be delivered. The court found it was to be delivered in Bridgeport and this conclusion of fact was warranted by the evidence. The contract was in writing, dated at Bridgeport. The question then is whether the words ‘Ship us transit car’ in connection with the place where the order was given, which was plaintiff’s place of business, constituted a contract express or implied designating Bridgeport as the place of delivery. There was no evidence as to the meaning of the terms ‘transit car’ in the lumber business, and the court construed the words ‘transit car’ as meaning loaded and on the way to Bridgeport, and that, therefore, the only definite place possible to be ascertained from the contract was Bridgeport,”

and held that title did not pass until delivery of the lumber to the purchaser at Bridgeport.

In the case of

Mayo vs Price, 218 S. W. 932-3.

decided in 1920 by the Court of Appeals of Missouri, an interpretation is given of the word “delivered” in connection with a contract of sale. Plaintiff was a wholesale grocery firm at Caruthersville, Missouri, and defendant was a commission firm at St. Joseph, Missouri. The defendant offered to sell plaintiff two cars of potatoes, “with shipment as quick as can get cars, dollar twenty-seven delivered.” Plaintiff answered, accepting the offer. Defendant failed to deliver and

plaintiff brought suit for damages. The Court, in ruling in favor of the plaintiff, held

“We must overrule the contention that the contract does not require a delivery of the potatoes at Caruthersville. The plaintiff’s place of business was Caruthersville, and when defendant by telegram from St. Joseph, Missouri, offered to sell plaintiff two cars of potatoes at the named price delivered, there could be but one fair meaning to the offer and that is delivery at Caruthersville.”

In the case of

Winkelmeyer Brewing Co. vs Nipp, 50 Pac. Rep.
956-958

decided by the Supreme Court of Kansas in 1897. Winkelmeyer contracted to sell to Saunders certain liquors, payment for the same being guaranteed by Nipp, and in pursuance thereof Winkelmeyer sold and shipped to Saunders at Wichita, Kan., six cars of beer which were not paid for, and the plaintiff brought suit alleging that the contract and sale was made in St. Louis and not in Kansas. According to the contract the freight was to be paid by Winkelmeyer. The Court in deciding this case held:

“The contract of sale is therefore complete when Saunders mails a letter or sends a telegram ordering a car load of liquors. The contract of sale is complete, but the sale is not. Something more remains to be done. The liquors must be separated and delivered to Saunders before the sale is completed. It is clear that the separation

took place in St. Louis. The delivery is ordinarily made to the purchaser by delivery to the carrier. Where the purchaser is to pay the freight, the carrier is his agent. The illegality of the sale of intoxicating liquors frequently depends upon the place where the sale is made. This is governed by the place where the sale is completed by delivery. Where the vendor is to, and does, pay the freight to the place of delivery, the place of delivery becomes the place of sale. 11 Am. & Eng. Enc. Law, 742. If by the terms of the contract the seller is required to send or forward the goods to the buyer, **the title and risk remain in the seller until the transportation is at an end, after which time the title is vested in the buyer.**" Citing cases. "The freight charges were to be paid by Saunders in the first instance, but were to be charged to the brewing company and deducted from the contract price of the liquors. Under a contract and transactions quite similar, the Supreme Court of Iowa, in *Brewing Co. vs DeFrance*, 58 N. W. 1087, held that the sale was completed by the delivery of the liquors at their destination. Following these decisions, which we think are founded upon correct principles, we must hold that the sales under the contract in this case were made in Wichita, Kan. It is immaterial where the agreement to sell was made."

It is therefore respectfully submitted that Rule 1 of the Uniform Sales Act has no application because it refers to the sale of specific goods in a deliverable state only, and that Rule 5 of the Uniform Sales Act

governs in this case for the reason that according to the weight of the testimony and according to the express agreement as contained in the letters the seller was obligated to deliver the bonds to the buyer at Lock Haven, Pa.

The Referee found as a matter of fact that the seller was obligated to make delivery of the bonds at Lock Haven and this finding was confirmed by the District Court.

However, it is contended that even if the agreement had contained no provision as to the delivery that if it had been the understanding that the bonds were to be taken up at Morris Brothers, Inc., in Portland, the title did not pass. In that event the transaction would be governed by Rule 4 of the Uniform Sales Act. In that event it would have been an agreement "to sell future goods by description" and nothing more. Rule 4 provides "where there is a contract to sell * * * future goods by description and goods of that description and in a deliverable state are **unconditionally** appropriated to the contract, either by the seller **with the assent of the buyer, or by the buyer upon the assent of the seller**, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

The assembling of various bonds by Morris Brothers, Inc., was not done with the assent of the buyers; no such assent was given and under the circumstances none can be implied.

The buyer in the instant case was not notified that

the appropriation was made, had no knowledge that part of the bonds had been set aside, and therefore there could have been no express assent of the buyer to the alleged appropriation.

Was there an implied assent?

Counsel for appellant contends that such an implied assent can be inferred from the circumstances and particularly from the fact of payment. If prior to the time of the purchase price Morris Brothers, Inc., had notified the buyer that it had a part of the bonds on hand and had them set aside and pursuant to this notice payment had been made, there would be ground for argument that an implied assent had been given, but the record does not disclose any such fact. According to the evidence payment was in fact made to apply on the purchase of the bonds, was not made because the bonds had been set aside and was not therefore made with the intention that title to the part of the bonds that had been set aside should vest in the buyer.

There is an English case decided by Chief Justice Earle, in many respects similar to the present cause. That case involved a contract for the sale of 250 bales of cotton of a cargo of 500 bales of one mark. Of the 500 bales contained in the cargo 250 were marked from 1 to 250 and a warrant was handed to the purchaser for 250 bales of cotton numbered from 1 to 250. Thereafter the seller inadvertently delivered 200 of the 250 bales to other persons, and they offered the plaintiff a warrant for other numbers. Plaintiff refused to ac-

cept the warrant and brought an action to recover the value of the 250 bales of cotton. At the trial the plaintiff insisted that the bales of cotton were so earmarked and appropriated to him by the act of the company as to vest the property in him. The defendant, however, submitted that the mere act of appropriation by the company of 250 out of a large number was not sufficient to vest the property in the specific bales in plaintiff without an **assent** to such appropriation on his part. The trial judge instructed the jury according to this contention of the defendant. A motion for a new trial was made on account of error in so instructing the jury. This motion was denied and upon appeal the decision of the trial court was affirmed. Earle, C. J., in his opinion stated in part as follows:

“This was an action for the alleged conversion by the defendants of 250 bales of cotton out of a cargo consisting of 500 bales, and the question is whether or not the property in these 250 bales ever vested in the plaintiff. For the affirmative of that proposition the plaintiff relies upon a delivery order from vendors, and the fact that the defendants by their warrant or certificate of warehousing had specifically appropriated to the plaintiff the bales numbered from 1 to 250. * * * Then it is said that the learned judge misdirected the jury in telling them that the mere act of appropriation by the company would not vest the property in the plaintiff unless he had assented to that appropriation, * * * I venture to say that the law as laid down by the learned judge was well laid down. It has been established by a long series of

decisions, of which it will be enough to refer to Hansen vs Meyer, 6 East 614, Rugg vs Minett, 11 East, 210, and Rhodes vs Thwaites, 6 B. & C. 688, that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and appropriation **assented to by vendor and vendee. Nothing passes until there is an assent, express or implied, on the part of the vendee.** The warehouseman may in some cases be the agent of the vendee for the purpose of such assent, but nothing passes until there has been a separation and an appropriation assented to."

Campbell vs Mersey Docks, 14 C. B. N. S. 412,
8 L. T. N. S. 245.

It is true that the decision of the learned jurist has been criticised by some authors on the ground that after the particular bales had been ear-marked and identified the purchaser was notified that they had been so marked and identified, and after being so notified made payment for the same, and that payment having been made by the purchaser after having been notified that the property had been set aside to him, the act of payment was an implied assent to the appropriation. While it is true that the fact that payment of the purchase price was made pursuant to notice that the goods had been segregated, identified and appropriated to the buyer, is a circumstance which would almost compel the inference that the appropriation was made with the assent of the buyer, in his decision Chief Justice Erle sustained an instruction given by the trial court to the jury that it was a ques-

tion of fact for them to find whether an implied assent had been given, notwithstanding that the particular bales of cotton were earmarked, identified and set aside and the purchaser was notified of this and thereafter made payment for the bales. The jury found no implied assent had been given and the trial court was sustained. In the instant case the purchaser was not notified of the segregation of the bonds, or that any of them had been appropriated to the contract. Payment was not made by the purchaser pursuant to any notice that the bonds had been assembled for delivery. Payment was not made upon any statement received by the buyer. In the letter accompanying the check for \$61,000, Mr. Hopkins stated:

“Enclosed you will find my check as trustee of the Estate of A. C. Hopkins for \$61,000.00, to apply on the purchase of municipal bonds made from you on December 9th. Upon receipt of this check, please send me an exact statement of our account and if there is any considerable balance due you I will send you another check. If there is no considerable balance, I will ask you to send the securities on to Mr. Shaffer at Lock Haven and let him remit any small balance direct.”

Can it be inferred that this letter was an express or implied assent to a segregation of the bonds, or to a passing of title? The Referee found as a matter of fact that the bonds were not set aside with the assent either express or implied of the buyer and it is submitted that no assent was given and none can be inferred from the evidence in this cause.

As a matter of law, segregation or appropriation

has no bearing in a case where delivery is to be made to the purchaser at any other place than at the buyers place of business.

In the case of

First National Bank of Binghampton vs Peek,
et al., 61 N. Y., App. Div. 258- 262,

the Court says:

“The setting apart and marking such piles might operate as a sufficient appropriation and delivery of the same if it were done under a contract of sale that permitted a delivery on the yard and required nothing more to be done than that the lumber sold should be identified. * * * The only contract existing between them, that of June 18th, required a very different delivery and never having abandoned or modified the so-called delivery by marking the piles was entirely inoperative to pass the title.”

The case of *Barrs & Co., vs Mitchell*, 154 Fed. 322, involved the sale of specific property to be delivered at the vendors' place of business. The lumber was specifically designated, described and segregated, and thereafter bills of sale with full description were presented and **accepted** and payment was thereupon made for the lumber which had been so segregated. In that case therefore there was clear assent of the buyer to the appropriation. It was a complete delivery of the lumber which had been segregated to the buyer and an acceptance by him of the same.

The case of *McElwee vs Metropolitan Lumber Co.*, 69 Fed. 302-305, also cited by counsel for the appellant, involved a contract for the sale of all the lumber which was to be manufactured by the defendant during a certain period. After the product of the mills for a particular month was completed, it was not only inspected by the buyer, but was measured and accepted by the buyer. In its opinion the court says:

“To say that title remained with the vendor after the lumber had been appropriated to the contract and accepted by the buyer and thereafter paid for by the buyer, would leave the vendor liable for loss by fire and the vendee without security for the payment he had made.”

In that case under the circumstances there was no question but that the buyer not only assented to the segregation but thereafter inspected and accepted the lumber.

In the case of

Hatch vs Standard Oil Co., 100 U. S. 124-136 (involving the sale of staves), the court says:

“Taken as a whole the evidence shows that the parties treated both piles of staves as delivered under the contract and that they regarded both as properly included in the adjustments of the amounts to be advanced. When the agent of the plaintiffs went there as before explained with one of the sellers it is certain that they counted both piles and it is clear that in view of the evidence and the circumstances the jury was warranted

in finding that the property in the white oak staves piled there passed to the plaintiff when they were billed and delivered at that place. * * * Actual delivery of the staves having **been proved** it is not necessary to make any reply to the defense set up under the state statute in respect to the sale of goods unaccompanied by a change of position."

Therefore in the Hatch case the facts showed that the contract involved the sale of specific goods, which had been inspected and accepted by the buyer and which the jury found had been actually delivered.

The case of Harris vs Egger, 226 Fed. 389, was one involving the sale of shares of stock. The court held that the certificates were merely evidence of the corporate interests of shares sold and therefore the non-delivery of the certificates could not disturb the executed character of the transaction. The facts in this case are entirely dissimilar to the facts in the case at bar.

In Terry vs Wheeler, 25 N. Y. 520-524, was a case involving the sale of lumber. The court said:

"The lumber was selected by **both parties** and designated as the lumber sold. The price for the whole was greed upon and paid and the bill of parcels receipted and delivered to the purchaser."

and held that these facts showed that the title vested in the purchaser. No question here of appropriation made without the consent of a buyer. The reason being that the buyer was present and inspected the lumber himself.

The cases cited by the counsel for appellant involve not only the sale of specific property but show that in each instance there was an appropriation made with the assent of the buyer.

All the circumstances surrounding this transaction show that both parties understood and construed the agreement as requiring delivery to be made to the buyer at Lock Haven, Pa. The agent of Morris Brothers, Inc., so understood the agreement. It was their intention to ship the bonds to Lock Haven insured in the name of Morris Brothers, Inc., at the expense of Morris Brothers, Inc. No notice was given by Morris Brothers, Inc., to the buyer that the bonds were being assembled in order to make delivery. Payment was not made because the bonds had been segregated. The payment covered not only that part of the bonds which were assembled, but also the \$10,000 Port of Bay City bonds which were never acquired by the bankrupt. When Mr. Hopkins mailed the check for \$61,000 in payment of the bonds nothing was said about a segregation. He only directed that the bonds be shipped to Lock Haven. No instructions were given as to the manner of shipment, as to the insurance of the bonds, or their safe transportation. All of these matters were left with the vendor because it was assumed that the bonds were being delivered at the risk of the vendor. We therefore submit that the Referee and the District Court were right in finding and holding that it was not the intention of the parties to this agreement that the title to the bonds should vest before they were actually delivered.

In Bankruptcy proceedings the right to reclaim goods should only be granted in those cases where the right clearly exists and the burden of proof is with the creditors to show their right by a clear preponderance of the evidence.

Matter of Murphy Shoe Co., 11 American B. R.
428;

Shook vs Levy, 39 American Bankruptcy Rep.
549, 240 Fed. 121.

It is respectfully submitted that the decision of the District Court in this cause should be sustained.

J. P. WINTER,
Attorney for the Trustee.

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**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

**W. EVERETT, JOHN R. SORENSEN, H. HANSEN, B.
JACOBSON, A. G. LARSEN, I. C. SORENSEN, P.
HANAN, EARL SIMMONS, WALTER STARKEY,
DONALD SMITH, GEORGE CORRON, ALEXANDER
EASTGATE, W. MURPHY, J. AMUNDSON, GEORGE
J. SMITH, JAMES RAY, E. GAUPHOLM, G. H. BEAU-
CHAMP, FRANK HOMAN, O. F. BOSTRONN, L. E.
OBLOM And P. SOGNEFEST,**

Appellants,

vs.

**THE UNITED STATES OF AMERICA AND THE UNITED
STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION, A CORPORATION,**

Appellees.

**Appeal from the United States District Court for the
Western District of Washington, Northern Division,
sitting in admiralty. Hon. Jeremiah Neterer, Judge.**

BRIEF OF APPELLANTS.

**JAMES KIEFER,
Proctor for Appellants.**

**327 Colman Building,
Seattle, Washington**

FILED

JAN 24 1922

F. D. MONCKTON.

No. 3811

**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

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Appellants,

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THE UNITED STATES OF AMERICA AND THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, A CORPORATION,

Appellees.

Appeal from the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. Hon. Jeremiah Neterer, Judge.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

The appellants, in these proceedings, seek to recover from the master and from the United States and the United States Shipping Board Emergency Fleet Corporation, the balances of wages due them as officers and seamen on the *S. S. Agron*, a merchant vessel owned by the United States and represented by the United States Shipping Board Emergency Fleet Corporation. There is no dispute as to the amounts due appellants nor is there any

dispute as to the ownership of the vessel. The sole and only question is as to the liability of the Government and the United States Shipping Board Emergency Fleet Corporation as owner.

On the 5th day of March, 1920, the Government was the owner of the incompleated wooden hull of the S. S. Agron, and on that day entered into an executory agreement for the sale of the hull and the furnishing of materials for its completion by the National Oil Company. The pertinent parts of this agreement will be printed in our argument. Delivery was made and the vessel completed and documented June 7, 1920, in the name of the United States represented by the United States Shipping Board Emergency Fleet Corporation. On that day practically all of the appellants signed articles with **Tory Hedemark appearing thereon as master**, for a voyage to Australia not exceeding twelve months, and return to a port of discharge in the United States.

The vessel returned as far as the Canal Zone, and was there libeled for salvage at the instance of the Shipping Board, as appears from **Exhibit G** attached to the original Agreed Statement of **Facts**, and finally condemned and sold, paying about forty-four (44) per cent of the wages, and the appellants herein seek to recover the balance due them.

The trial court made Findings of Fact establishing the amounts due the appellants, respectively, and entered a decree against the respondent **Tory Hedemark** for said amounts, but dismissed the libels as to the respondents United States and the **United States Shipping Board Emergency Fleet Corporation**, upon the ground that the National

Oil Company, through its subsidiary, the National Oil Transport Company, employed the master, Hedemark, who in turn employed the seamen, and that as to the seamen the National Oil Company is to be regarded as owner *pro hac vice*.

ASSIGNMENTS OF ERROR.

I.

The Court erred in admitting in evidence respondent's United States Shipping Board Emergency Fleet Corporation Exhibit "A", being a contract between the National Oil Transport Company and Universal Shipping & Trading Company, dated May 25, 1920.

II.

The Court erred in admitting the evidence of the witness Alexander Matthews, a witness on behalf of the respondents United States and United States Shipping Board Emergency Fleet Corporation, over the objection and exception of the libelants.

III.

The Court erred in holding, decreeing and adjudging that the libels of the libelants, and each of them, be dismissed as against the respondents the United States and the United States Shipping Board Emergency Fleet Corporation, and that the libelants, and each of them, take nothing thereby as against said respondents United States and United States Shipping Board Emergency Fleet Corporation.

IV.

The Court erred in making and entering that certain decree, wherein and whereby it was decreed

that the several libels of the several libelants be dismissed, and that the said several libelants take nothing thereby as against the respondents the United States and the United States Shipping Board Emergency Fleet Corporation.

V.

The Court erred in holding and concluding as a matter of law that the United States and the United States Shipping Board Emergency Fleet Corporation were not the owners of the S. S. Agron, and not liable for the wages of the several and sundry libelants herein, and in dismissing the several libels of the several libelants with prejudice as against the said respondents United States and the United States Shipping Board Emergency Fleet Corporation.

ARGUMENT

For the sake of convenience and brevity throughout this brief, we will refer to the United States and the United States Shipping Board Emergency Fleet Corporation as the appellees, and in case of specific reference to the United States Shipping Board Emergency Fleet Corporation, we will refer to it as the Fleet Corporation.

We will first discuss what appears to us to be the controlling question in the case, and that is this:

IN THE STATE OF THE RECORD IS THE
REGISTERED OWNER, ADMITTEDLY
THE ACTUAL OWNER, LIABLE IN
PERSONAM FOR WAGES OF
APPELLANTS?

In the decision found in the record at page 16, the trial court exonerated appellees upon the theory

that the National Oil Company, through its subsidiary the National Oil Transport Company, was the owner of the S. S. Agron *pro hac vice*.

The relation of the National Oil Company to the vessel must, as we view it, be determined from the contract entered into between appellees and the National Oil Company. As the record has not been printed, we here reproduce the pertinent and controlling portions of the contract. It is between the Shipping Board and the Fleet Corporation, as representing the United States, and the National Oil Company, a New Jersey corporation, termed the buyer, and proceeds:

"1. That the Fleet Corporation hereby agrees to sell to the buyer and the buyer hereby agrees to purchase from the Fleet Corporation the following uncompleted wooden hulls * * * No. 2678 'Agron' (twin screw) together with (material for the completion thereof) * * *.

(a) The purchase price of each of said hulls should be the sum of \$70,000.00.

(b) The purchase price of each of the said bills of material No. 500 shall be the sum of \$85,000.00 with proper deduction for such items as the Fleet Corporation is unable to deliver.

2. Immediately upon the execution of this agreement, the Fleet Corporation agrees to deliver into the custody of the buyer the said five (5) hulls and five (5) bills of materials No. 500. The buyer shall accept delivery of the said hulls and bills of material where they are now, in Pacific Coast Storage, and it is expressly agreed that the said hulls and bills of material are delivered into the custody of the buyer for the sole purpose of completion thereof by the buyer; and the buyer agrees at its own expense to complete the same at the earliest date possible consistent with good workmanship.

It is expressly agreed that the title to the said hulls and bills of materials and any additions or improvements made thereto shall remain in the Fleet Corporation until the same shall be completed and documented and the buyer shall have executed the mortgage and notes hereinafter provided for. From the time of delivery of said hulls and/or bills or material to the buyer, the buyer hereby agrees to keep the said hulls and/or bills of material free from all liens and incumbrances and to keep the same insured against fire and/or builder's risks at the full value thereof, all policies to be payable to the Fleet Corporation and/or to the buyer as their interests may appear, and the binders or policies to be delivered to the Fleet Corporation.

3. The buyer agrees to pay the purchase price of each of said hulls and sets of machinery to the Board in gold coin of the United States, or its equivalent in current funds as follows:

Upon the completion and documentation of each of said hulls, the buyer agrees to execute and deliver to the Board a first mortgage on said vessel in the Board's Standard Form, said mortgage to secure the payment of the actual amount determined due the Fleet Corporation as shown in sections 'a' and 'b' of Paragraph I, payable in eight (8) equal semi-annual installments, the first installment payable six (6) months from the date of completion of said vessel. All payments shall bear interest at the rate of five (5) per cent per annum from the date of this contract and shall be represented by promissory notes of the buyer."

(Followed by attestation clause and signatures of Shipping Board and Fleet Corporation and National Oil Company.)

It is admitted that this contract was never recorded in any public office, and that the S. S. Agron was completed and outfitted by the National Oil Company, operating through its representatives

or contractors, and that no mortgage was ever executed.

The vessel was documented June 7, 1920, in the name of the United States, represented by the Fleet Corporation, and Certificate of Registry incorporated in the original Agreed Statement of Facts shows Tory Hedemark as master.—(Record 9.)

The only evidence to connect the National Oil Transport Company with the vessel in any way is the stipulation found at page 15 of the record, and to the consideration of which appellants objected. There is, it is true, the testimony of Matthews that he corresponded with both companies, and there is the contract, Fleet Corporation Exhibit A, between the National Oil Transport Company and the Universal Shipping & Trading Company, all of which went in over the exception and objection of appellants.

It is the contention of appellants that there is nothing in the record to show any contract relation between the S. S. Agron and the National Oil Transport Company. The record is bare of any evidence showing the relation between the National Oil Company and the National Oil Transport Company. The mere fact that the National Oil Transport Company is a subsidiary of the National Oil Company does not disclose their contract relations. The record does not show the corporate purposes of either company, and if any inference is to be drawn from the names of the two companies, it would be to the effect that they are engaged in the oil business and not in the operation of steamships. The stipulation found at page 15 of the record, and the testimony of the witness Matthews,

found at page 50 of the record, should have been excluded upon the objection of appellants. The Court certainly erred in admitting it, as it does not show, or tend in any wise to show or illustrate, the relations between the National Oil Company and the National Oil Transport Company and the vessel. The mere fact that the National Oil Transport Company assumed to operate the vessel is of itself inadmissible, and this evidence discloses nothing beyond the mere fact of assuming to operate the ship. It is like admitting the declarations of an agent to prove the fact of agency.

There is absolutely nothing in the record to sustain the Court's holding and finding to the effect that the National Oil Transport Company, or the National Oil Company, was owner *pro hac vice*. The contract, as we have seen above, does not contain any hint or suggestion of an operating contract. It goes no further than any ordinary executory contract for the sale of chattels, and it contains within itself a clear statement of the time and circumstances when it becomes a fully executed contract. When the vessel was completed it was to be documented in the name of the buyer and a mortgage given for the purchase price of the hull and the materials for completing it. At that point the contract would become an executed one, and certainly would control and define the relations of the parties no further.

Let us look at the facts and see what happened: The vessel was documented not in the name of the buyer, but in the name of the United States, the real owner, and no mortgage was ever given. The record is absolutely bare of explanation as to how or why this was done. It seems clear that

the only presumption which can be indulged in is that the contract was abandoned and that the real owner of the vessel, through the Fleet Corporation, was controlling it and operating it.

It is to be borne in mind that the affidavit of registry, Exhibit EA to the original Agreed Statement of Facts, discloses that on June 4, 1920, Tory Hedemark made his statutory affidavit of citizenship; that on the same day the authorized official of the Fleet Corporation or Shipping Board made the statutory affidavit of ownership preliminary to registry, swearing that the United States, represented by the Shipping Board, was the owner, and leaving blank the name of the master. This affidavit was filed on the 7th of June, 1920.

It will be observed that in the affidavit of ownership, the blank space for the name of the master is left unfilled. Section 4142 of the Revised Statutes requires that the affidavit for registry shall name the master and state that he is a citizen as well as how he is a citizen. Surely the appellees can not take advantage of their own omission. Particularly is this the case when we remember that at the time of the filing of this affidavit it had endorsed upon it the affidavit of Hedemark, the master, establishing his citizenship. Surely, it must be held that the appellees, by filing this affidavit, adopted, confirmed and approved the appointment of Tory Hedemark as master of the vessel. This can hardly be gainsaid in the face of the fact that the certificate of registry, naming Tory Hedemark as the master, was accepted and carried to sea as a part of the ship's papers and used by the master in his relations with the appellants, as will be hereafter shown.

It certainly will not be contended that the master could not bind the owner of the vessel for the wages of the seamen employed by him as such master.

Sections 4612 and 4525 of the Revised Statutes are both a part of the Shipping Act of June 7, 1872. By Sec. 4612 the term "owner" is defined as "All the several persons, if more than one, to whom the vessel shall belong." By Sec. 4525 it is provided that all seamen shall be entitled to claim and recover their wages of the master or owner in personam. The two provisions are contained in the same statute, and certainly it must be taken that the term "owner" is used in the same sense in both provisions.

It is difficult to see upon what theory the trial court adjudged the relations between the appellees and the National Oil Transport Company to be that of a charter making the latter the owner *pro hac vice*. Even where a charter admittedly exists, there is no presumption that the charterer is owner *pro hac vice*.

The Supreme Court, in the case of *Raymond vs. Tyson*, 58 U. S. 53, Vol. 15 Law Ed. page 51, quotes with approval the following language of Judge Story, used by him in 2 Sumner 597:

"Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion that it is doubtful whether the charterer was intended to have the sole possession and control of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such, for his rights and authorities over the voyage must continue, unless displaced by some clear and determined transfer of them."

Bearing in mind the principle here laid down,

how can it be said that the record in this case discloses anything approaching or approximating a charter.

It is abundantly well settled that the owner of a vessel is not liable in personam for supplies where a vessel has been chartered and the charterer employs his own master and buys his own supplies. There are a few cases extending this doctrine to seamen's wages. If these cases are examined, however, it will be found that in every one of them there was a more or less formal operating contract, amounting to a charter. The contract in evidence here, and under which the National Oil Company came into possession of the vessel, has not any of the elements of an operating contract. Indeed, the contract taken altogether completely negatives the theory of an operating contract. It is nothing more nor less than an executory contract of sale, lacking all of the elements of an operating contract.

This language found in the contract, we submit absolutely negatives any theory of operation under this contract, and, of course, negatives any theory of ownership *pro hac vice* in the National Oil Company or its subsidiary the National Oil Transport Company. The language referred to is as follows:

“And it is expressly agreed that the said hulls and bills of materials are delivered into the custody of the buyer for the sole purpose of completion thereof by the buyer. * * * It is expressly agreed that the title to the said hulls and bills of materials, and any additions or improvements made thereto, shall remain in the Fleet Corporation until the same shall be completed and documented and the buyer shall have executed the mortgage and notes hereinafter provided for.”

We confidently challenge proctors for appellees to cite a single case of the application of the doctrine of ownership *pro hac vice* not based upon some sort of operating contract, whether formal or informal. Not a case, we say with great confidence, can be found in the books applying the doctrine of ownership *pro hac vice* in favor of the ship owner, except where the controversy arose over some kind or style of operating contract, however formal or informal.

We submit finally that the appellees are absolutely estopped by their own record made in the Custom House at Seattle at the time of the registry of the vessel. The record made in the manner provided by law disclosed the ownership of the S. S. Agron to be in the United States, represented by the Fleet Corporation, and whether the appellants examined this record or not, they may avail themselves of it and take its benefits. Having filed an affidavit, which had endorsed upon it the statutory affidavit of citizenship executed by one purporting to be the master, and having accepted and used a certificate of registry based thereon, which recited that the person making the affidavit was master, the appellees are absolutely estopped to deny the appointment of the master, with all the powers incident to that position, which, of course, included the right to hire seamen as agent of the owner.

The appellees are estopped for another reason: The vessel went to sea with this certificate of registry as a part of the ship's papers, and prior to January 6, 1921, while lying in the port of Iquique, South America, the master, being unable to pay the crew on account, as they were entitled

to be paid by law, and the crew being restless and threatening to quit, called together a large portion of the ship's crew and pointed out to them that the vessel was registered in the name of the United States, and inquired if they were afraid of their wages from the Government, and thereupon the men returned to their duties and remained on board until April 15, 1921, when removed by the United States Shipping Commissioner for lack of provisions to maintain them on board. Finding XXV (Record 31).

It is undisputed that the balances due the appellants for wages and expenses of returning home all accrued subsequent to this occurrence. A short calculation will reveal that as to any of the appellants. Clearly, the appellants having remained on board and at their respective stations and performed their duties after this occurrence, the appellees are absolutely estopped to deny the effect of the registration and to dispute their liability in personam to these appellants.

As we understand the proctors for appellees, it is admitted to be the settled law that seamen have a three-fold remedy for their wages, namely, the personal liability of the master, the personal liability of the owner, and their right to proceed in rem against the ship and freight. Indeed, it is difficult to see how it can be contended otherwise in the light of the authorities.

Farrell vs. McLea, 1 Dallas 392; 1 Law Ed. 191.

Sheppard vs. Taylor, 8 Law Ed. 269, 5 Peters 675.

The A. Heaton, 43 Fed. 592-5

Cary vs. The Kitty, Bee's Rep. 255, Vol. 5 Fed. cases, page 59; Case No. 2401

Bronde vs. Haven, Gilpen's Rep. 592; Fed. case No. 1924. Vol. 4, page 211

Hall vs. Hudson, 2 Sprague 65, Fed. case No. 5935. Vol. 11, page 227.

The Dawn, 1 Ware 486-499

The Galloway, Fed. case No. 5204, Vol. 9, page 1111.

Skolfield vs. Potter, 22 Fed. cases, page 299 (No. 12, 925).

As we understand the contention of proctors for appellees, they plant themselves upon the doctrine that the appellees are in the position of mortgagees out of possession, or owners whose vessel is being operated under charter amounting to a demise.

We submit that we have shown that there is no charter in this case. It is our contention that the doctrine of mortgagee and mortgagor has no application here. The only inference or presumption to be drawn from the conduct of the parties from the admitted facts, is that the executory contract was abandoned and the real owner was operating the vessel.

As to the conclusive effect of the oath of registration and the acceptance of the certificate, we cite:

The Dubuque, 7 Fed. cases, page 1141, case No. 4110.

In the case of *Jennie B. Gilkey*, 19 Fed. 127, Judge Lowell discusses the effect to be given the registry or enrollment of a vessel. It is true that in that case the question before the Court was as to the effect of the naming of the home port in the certificate of registry. The principle as applied in that case is exactly the same as the principle involved here, namely, the effect to be given to a certificate of registry. In that case, it was held that the naming of a home port in the certificate of registry establishes the home port of a vessel and

this presumption can only be overcome by clear proof.

The case of *Russell vs. Rackett*, 46 Fed. 200, is extremely close to the case at bar in its facts. In that case, the owner of a vessel made an agreement with the master, by which the latter was to operate the vessel, pay for all supplies and wages, and half the port charges, and the net earnings arising to be equally divided between master and owner. The libellant was hired as mate without knowledge of the arrangement, but later learned of it from the master. He continued in service, and upon discharge, the master gave him a due bill in writing stating that the captain, the vessel and owner owed the mate \$90.00 for wages. The wages represented by this statement were earned after the mate learned of the operating arrangement. Thereafter a settlement was had between owner and master before the due bill was presented to the owner. The owner, upon presentation, refused payment and libel in personam against the owner was filed. Held by Judge Brown, in the Southern District of New York, that the owner was liable.

It may be contended that the contract of the libellants was merged in the decree in the United States District Court in the Panama Canal Zone, whereby the vessel was condemned and ordered sold for the payment of the wage claims of the libellants. To that there are several answers. In the first place, the sale was without jurisdiction and wholly void. The master, by timely appearance, suggested to the Court, through his claim and peremptory exception, the ownership of the vessel by the United States, and challenged the jurisdiction of the Court to proceed in rem. Manifestly,

under the Act of March 6, 1920, the Court in proceeding further, was acting wholly in excess of its jurisdiction, and the proceeding was a nullity.

Conceding for the sake of argument that we are wrong in this, we submit that it is the settled law that a contract upon which personal liability exists, is not merged in a decree in a proceeding in rem so as to cut off the further pursuit of the remedy in personam against the party liable.

Durrant vs. Abendroth, 97 N. Y. 132.

Toby vs. Brown, 11 Ark. 308.

Cary vs. The Kitty, Bee's Rep. 254, Fed. case No. 2401, Vol. 5, Fed. cases, page 59.

The Cerro Gordo, 54 Fed. 391.

Boynton vs. Ball, 129 U. S. 457; 30 Law Ed. 986.

Whitney vs. Tibbol, 93 Fed. 686.

To sum the matter up, we earnestly contend that in the absence of explanation, the fact of documenting the vessel, not according to the terms of the executory sale contract but in the name of the United States, the original owner, the Court will conclusively presume that the contract was abandoned, and in the second place, there being no evidence of a charter of any kind or character, or even of the loosest possible operating contract, there is nothing to take the case out of the ordinary situation of the general owner of the vessel being assumed to operate her, and held liable for all her engagements and omissions.

The decree should be reversed and the record sent back with instructions to enter a decree against the United States and the Fleet Corporation, in the amounts due the respective appellants, with statutory interest from the date of filing their several libels and costs.

Respectfully submitted,

JAMES KIEFER,
Proctor for Apellants.

No. 3811

IN THE

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

W. EVERETT, JOHN R. SORENSEN, H. HANSEN, B. JACOBSON, A. G. LARSEN, I. C. SORENSEN, P. HANAN, EARL SIMMONS, WALTER STARKEY, DONALD SMITH, GEORGE CORRON, ALEXANDER EASTGATE, W. MURPHY, J. AMUNDSON, GEORGE J. SMITH, JAMES RAY, E. GAUPHOLM, G. H. BEAUCHAMP, FRANK HOMAN, O. F. BOSTRONN, L. E. OBLUM and P. SOGNEFEST,

Appellants,

vs.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION, SITTING IN ADMIRALTY.

HON. JEREMIAH NETERER, Judge

ee
BRIEF OF APPELLANTS

THOS. P. REVELLE, United States Attorney,
JOHN A. FRATER, Asst. United States Attorney,
MacCORMAC SNOW,

Proctors for Appellees.

501 Platt Building,
Portland, Oregon.

FILED

FEB 6 - 1922

**F. D. MONCKTON;
CLERK**

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HON. JEREMIAH NETERER, Judge

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

The hull of the *Agron* was built for the United States, represented by the Shipping Board and the

Fleet Corporation and conveyed by the builder to the United States by bill of sale of June 19, 1919. (Agreed Statement, Article I, Apostles, page 8.)

March 5, 1920, this hull was agreed to be sold to National Oil Co. under a contract by which the United State retained title and National Oil Co. took possession of the vessel and agreed to complete her, and to give a mortgage back for the amount of the unpaid purchase price. (Agreed Statement, Article II.) The invoice and sales receipt are confirmatory of conditions of the contract. The acceptance shows the vessel to have been delivered to National Oil Co. June 4, 1920. The contract was not recorded. The mortgage was never executed. (Agreed Statement, Article III.)

National Oil Co. having completed and outfitted the vessel, turned her over to National Oil Transport Co. for operation. National Oil Transport Co. is an operating company for National Oil Co. which owns the stock therein. (Stipulation, Apostles, page 15.) Mr. Matthew testified that National Oil Transport Co. is a subsidiary of National Oil Co. and that after the execution of his contract, he received correspondence about it sometimes from one company and sometimes from the other. (Apostles, page 50.)

May 25, 1920, National Oil Transport Co. employed Universal Shipping & Trading Co. of Seattle as managing agent for the vessel. (Apostles page 50 and Respondent's Exhibit A, together with contract attached.) Prior to June 4, 1921, Universal Shipping & Trading Co., as such agent, employed respondent Tory Hedemark as Master. (Findings of Fact, Article XXIII. Apostles page 31.)

June 7, 1920, the *Agron* was registered in the name of the United States, represented by the Shipping Board. (Agreed Statement, Article IV and Exhibit.) On the same day the Ship's Articles were signed. (Agreed Statement, Article V and Exhibit.)

Libelants did not know that the vessel was registered in the name of the United States, but knew she was of a type built for the United States. (Findings of Fact, Article XXIV.) Judge Neterer found that no representations were made to the libelants as to the ownership of the vessel. (Opinion.) There were no contractual relations between the United States and the National Oil Transport Co. and/or Universal Shipping and Trading Co. (Findings of Fact, Article XXIV.)

The *Agron* commenced the voyage in question

in June, 1920, and throughout the voyage was managed by the Universal Company. (Matthew's Testimony.) During the voyage, the Master appeased the libelants in their demand for advances by showing them the certificate of the registry of the vessel. (Findings, Article XXV.) She arrived at the Canal Zone January 22, 1921, under tow of the Lake Fambush, a Shipping Board vessel, whose Master thereupon libeled her for salvage in the District Court of the United States for the Canal Zone. Libelants intervened for their wages and were granted a decree. The vessel was sold under this decree and the proceeds distributed among libelants. (Agreed Statement, Article VI and Exhibit.)

Libelants returned to Seattle and brought the present suit against the United States, the Emergency Fleet Corporation and Captain Hedemark. Judge Neterer held them entitled to recover from Captain Hedemark the amounts set forth in the decree, aggregating some fourteen thousand dollars, being the balance of wages and expenses due them after deducting the amounts received by them under the Panama decree. The libels were dismissed as to these respondents. (Findings of Fact and Decree.)

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ARGUMENT

Two defenses were made at the trial by respondents, United States and the Emergency Fleet Corporation:

First: That libelants cannot recover from them, there being no privity of contract. And,

Second: That libelants cannot maintain this suit against them under the Suits in Admiralty Act of March 9, 1920, and, therefore, not at all.

The District Court passed on the first point favorably to the contentions of these respondents and did not touch upon the second. Both defenses will be argued in this brief.

NO PRIVITY OF CONTRACT

There can be no liability for wages without a contract of employment. Libelants having the burden of proof, have failed to show any contractual relations between themselves and the United States or its representatives. Indeed, respondents have affirmatively shown that no such contract relations existed. The Shipping Board did not control the vessel after the contract of March 5, 1920. By virtue of this contract National Oil Co. took possession and its subsidiary and operating company, National

Oil Transport Co. took charge of the operation and entered into a managing agency contract with the Universal Shipping & Trading Co. The Universal Co. appointed the Master. The ship's articles were signed by the Master and the sailors, the former signing as the agent of National Oil Transport Co.

This company was the principal in the transaction. One test of the whole question of liability is this: Is the National Oil Transport Co. liable for the wages in question? If so, the United States and the Fleet Corporation are not liable. There can be but one principal.

The only ground on which the United States and its representatives are sought to be held is that the vessel was at the time of the voyage registered in the name of the United States. If we understand counsel correctly, he contends that the act of registering the vessel constituted an appointment of Tory Hedemark as Captain by the United States; or if this theory is incorrect, that the act of registering the vessel estops the United States from denying that the Captain is its agent.

The Court's attention is invited to the documents constituting this registration. The first of these is the affidavit of H. R. Bowen, Executive Assistant, Division of Supply & Sales in which he

makes oath respecting the *Agron* that "said vessel is wholly the property of the United States of America represented by the United States Shipping Board, Seattle, Washington * * * and that the present Master is a citizen of the United States, having been born therein." The next document is the Master's oath in which the respondent, Tory Hedemark, describing himself as Master of the *Agron*, swears that he is a citizen of the United States, having been born in Norway and naturalized in the State of Washington. These two oaths having been made, the certificate of registration issued wherein it was certified that H. R. Bowen "having taken and subscribed an oath required by law and having sworn that the United States represented by the United States Shipping Board is the only owner of the vessel called the *Agron* of Seattle, whereof Tory Hedemark is Master, and is a citizen of the United States * * * said vessel has been duly registered at this port."

It would do violence to the language used in Mr. Bowen's oath to treat it as a power of attorney constituting Tory Hedemark, an agent of the United States. Captain Hedemark's name does not appear in Mr. Bowen's affidavit. The fact that it seems to have been omitted through inadvertance, does not

alter the case. If it were inserted in the appropriate blank space, this insertion would not be effective to make the United States responsible for the acts done by Hedemark as Master of the vessel. It is clear that the purpose of the insertion of the Master's name in the oath of registry is to establish of record the legal requirement that the Master be an American citizen. Accordingly we insist that there was no actual employment of Captain Hedemark by the Shipping Board and no act was done by the Board which could be construed as such employment.

Nor are these respondents, as we contend, estopped to deny their employment of Captain Hedemark. It does not appear in the record that libelants investigated the registry of the vessel before or at the time of signing on. In fact the contrary was found by the Court. They made no inquiries at the Custom House and did not know that the vessel belonged to the Shipping Board, although they did know she was of a type built for the Shipping Board. The record shows that they did not investigate the registry of the vessel until the certificate was shown to them by the Captain in South American waters in order to make them stay on the job. It cannot be said that they then remained on the

vessel because of the fact disclosed by the registry certificate. They stayed because of their contract obligation with National Oil Transport Co. In other words, the articles had not yet expired.

If the libelants had known at the time of signing on that the vessel was registered in the name of the United States, the case would not be altered. The vessel was then in the hands and under the control of the National Oil Transport Co. as owner *pro hac vice*. The contract of employment was with the National Oil Transport Co. Libelants contracted with this company as principal and looked to it for the payment of their wages, reserving, of course, their remedies against the Master and the vessel.

If libelants rely upon estoppel *in pais*, they must show:

1. Representations made by the United States to libelants with the intent that they should be acted on, or with reasonable anticipation that they might be acted on.

2. Reliance on these representations by libelants in good faith and with reasonable diligence.

3. A change of position by reason thereof.

2 C. J. 461, Secs. 70-72.

Libelants have failed in all three respects. They

have not shown that the Shipping Board caused this vessel to be registered in the name of the United States in order to induce them to sign the articles, or with the reasonable anticipation that such registrations would induce them to sign. The record shows affirmatively that they did not sign the articles in reliance on the registry, nor is there evidence that they would not have signed on had the vessel been otherwise registered.

But we believe proctor for libelants charges that an estoppel exists by the record. It is conceded that on account of the record made in the Custom House at Seattle, these respondents are precluded from denying that the *Agron* was registered in the name of the United States. They are not, however, precluded from denying that the United States employed Captain Hedemark and that a contract of employment existed between libelants and the United States. The authorities hereafter cited are conclusive on this point.

OWNER PRO HAC VICE LIABLE FOR VESSEL'S EXPENSES

It has long been held that where the general owner of a vessel places her in the exclusive possession and control of another, that other person be-

comes the owner *pro hac vice* with respect to liability for wages and other expenses. Mr. Justice Story has defined the degree of control by the owner for the voyage or the owner *pro hac vice* to render him so liable.

Marcardier vs. Chesapeake Ins. Co., 8 Cranch 39, 49.

“A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. Such is understood to have been the case of *Vallejo vs. Wheeler*, Cowp. 143. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; such was the case of *Hooe & Co. vs. Groverman* in this court, 1 Cr. 214. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner.”

Leary vs. U. S., 14 Wallace, 607, 610.

Mr. Justice Field said in this case:

“There is no doubt that under some forms of a charter party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of

ownership. * * * If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel."

These distinctions have been approved in numerous cases including the following:

Reed vs. U. S., 11 Wallace 591.

Shaw vs. U. S., 93 U. S. 235.

U. S. vs. Shay, 152 U. S. 178.

U. S. vs. Hvoslef, 237 U. S. 16.

It is confidently asserted that the *Agron* was for the voyage in question in the hands of National Oil Transport Co. as owner *pro hac vice* and that consequently the United States is not liable on the ship's articles. No cases have been found applying this doctrine under circumstances exactly like the case at bar, but the analogies are close.

In all of the cases to be cited, the question of liability for wages is made to depend on the contract

of employment. Where the contract of employment is with the owner *pro hac vice*, he is held liable for wages, and not the general owner.

FORMER OWNER NOT LIABLE AFTER VESSEL
CHANGES HANDS

It is, of course, true that the owner of a vessel cannot escape liability for wages by transferring title while ship's articles are in force. If this were possible, he could avoid paying deficits by selling the ship to a beggar.

Sheppard vs. Taylor, 5 Peters 675, 706.
Bronde vs. Haven, 4 F. C. 211.

Nor can the owner avoid liability for pending wages by abandoning to insurers.

Brooks vs. Dorr, 2 Mass. 38, 45.

However, where the owners sell a vessel and subsequently ship's articles are entered into, they are not liable for wages even though the vessel is still documented in their names.

Aspinwall vs. Bartlet, 8 Mass. 483.

This case is nearly on all fours with the case at bar. Bartlet was the owner. The Master sold the ship in London but not being authorized to execute a bill of sale, he accepted the purchase price, exe-

cuted a time charter to the purchasers, and retired from the operation of the ship. Later plaintiff's testator signed articles. It was held that plaintiff could not recover the wages thus incurred from Bartlet.

Hussey vs. Allen, 6 Mass. 162.

Defendants owned a ship and sold her during a voyage. A month after the sale and during the same voyage, plaintiff furnished supplies for her at the request of the Master in a foreign port. At this time it was not known to plaintiff or the Master that the sale of the vessel had been made. Plaintiff brought an action at law against the former owners. The court said:

“And it is our opinion that the original owners are not liable to pay for any supplies furnished for the vessel, after they have sold all their interest in the vessel, although neither the master, nor the merchant furnishing the supplies, has any knowledge of the sale. The obligation, imposed on owners of vessels abroad, to pay for the necessary supplies furnished to the master, is founded on the principle, that the master is for this purpose their agent, and is authorized to bind them in this case; because the supplies are for their use and benefit, and without which their vessel cannot proceed on her destined voyage. But when the owners have alienated all their interest in the vessel, the master ceases to be their agent, and the supplies are not furnished for their use.”

Proctor for libelants suggests that the *Agron* may have been in the tortuous possession of National Oil Transport Co. If so, the principle is the same.

The General McPherson, 100 Fed. 863.

This vessel sailed to Alaskan waters where the Captain converted vessel and cargo to his own use. One Poole who had shipped as supercargo now became cook under a written agreement for \$90.00 per month wages. On his return he libeled the vessel for wages as cook. He was not permitted to recover.

OWNER PRO HAC VICE UNDER CHARTER PARTY
LIABLE FOR WAGES

Applying Mr. Justice Story's doctrine of the *Marcardier* case, where a charter party gives to the charterer the exclusive possession, command and navigation of the ship, he and not the general owner is liable to the seamen for wages. This is plainly on the ground that the contract of employment is with him and not with the general owner.

Goodridge vs. Lord, 10 Mass. 483.

The charterers in this case were held to be the owners *pro hac vice*. They placed funds in the hands

of the Master to pay wages but were already indebted to the Master in an amount equal to this sum. The Master retained the funds. The sailors libeled the ship and the owners were required to pay the wages to release her. It was held that the owners could recover from the charterers. The court said:

“From the facts stated in this case, it appears that the defendant, as master of the vessel, was liable to the seamen for their wages; and that the plaintiffs were not liable, Marston and Burbank being substituted as owners for that voyage by the charter party, and having stipulated to pay all the expenses of victualling and manning the vessel.”

In the following cases the owner *pro hac vice* was held liable for wages, the Master being held to have been his agent in executing the ship's articles:

Webb vs. Peirce, 29 F. C. 501.

The L. L. Lamb, 31 Fed. 32.

Giles vs. Vigereaux, 35 Me. 300.

In the cases which follow, it was held that the charterer was not given the exclusive possession, command and navigation of the vessel and, therefore, was not the owner *pro hac vice*.

Skolfield vs. Potter, 22 F. C. 299.

Harding vs. Souther, 12 Cush. 307, 315.

Sheriffs vs. Pugh, 22 Wis. 267.

Russell vs. Racket, 46 Fed. 200.

The doctrine of the case of *Skolfield vs. Potter*, *supra*, to the effect that a Master operating a ship on shares and being in charge of the navigation thereof, is not an owner *pro hac vice* for the purpose of relieving the general owners from liability for wages is perhaps somewhat discredited by the collision case of

Thorp vs. Hammond, 79 U. S. 408, 416.

MORTGAGEE IN POSSESSION LIABLE FOR WAGES—
MORTGAGEE OUT OF POSSESSION NOT LIABLE

It may be considered that the position of the Government with respect to the *Agron* is similar to that of a mortgagee out of possession, although the mortgage contemplated by the National Oil Co. contract was never actually given. Treated under this analogy, the case falls under the doctrine expressed by the editors of *Cyc* as follows (35 *Cyc* 1230):

“A mortgagee in possession of a vessel is liable for seamen’s wages, but not a mortgagee not in possession.”

Morgan’s Assignees vs. Shinn, 82 U. S. 105, 110.

Shinn advanced money to Kelly to purchase an interest in a vessel of which Morgan, Rhinehart &

Co. was ship's husband and representative of the other owners. Kelly gave Shinn an absolute bill of sale which, however, was shown by parol to have been intended as a mortgage. In the certificate of enrollment, Shinn was named as an owner. The vessel was burned. In course of liquidation, the assignee of the Morgan Co. brought his bill against Shinn to require him to contribute toward repairs and expenses of the vessel. The court said:

“If then Shinn was only a mortgagee of an undivided interest in the vessel, as we think he was, he is under no obligations to contribute for repairs which he did not order. A mortgagee out of possession is not liable for repairs. The benefit of repairs enures primarily to the mortgagor. A mortgagee out of possession does not appoint the master, or the ship's agents. They do not act under authority from him, and he is not entitled to the freight earned. Nor does it make any difference though the vessel be registered in his name.”

Davidson vs. Baldwin, 79 Fed. 97.

The Bramen, 4 F. C. 10.

Kenneway vs. The Wickford, 14 F. C. 330.

Champlain vs. Butler, 18 Johns. 169.

Tucker vs. Buffington, 15 Mass. 477.

Dickey vs. Farinault, 11 L. C. R. 150.

Annett vs. Carstairs, 3 Camp. 345.

REVISED STATUTES SECTIONS 4525 AND 4612

These sections are both parts of the Act of June

7, 1872, Chapter 322, 17 Stat. L. 268. Libelants contend that their right of recovery is permitted by Sec. 4525 and that under the definition of "owners" in Sec. 4612 they can recover against these respondents.

A cursory examination of Sec. 4525 discloses that it is intended only to abolish the ancient rule that freight is the mother of wages and is not otherwise intended to change the law. This section gives sailors a right to recover wages, although the voyage does not result profitably, but "subject to all other rules of law and conditions applicable to the case." An examination of the definition in Sec. 4612 discloses that its only intent is to make it clear that where a vessel has several owners, each one of these is designated wherever the word "owner" is used in the Act.

Taken together these sections cannot be construed to do away with the rules of maritime law concerning the respective liabilities of general owners and owner *pro hac vice*. Nor do these sections permit sailors to recover wages from any person with whom they have no contract of employment.

SUMMARY

Mr. Justice Story's definition in the *Marcardier*

case of an owner *pro hac vice* has always been followed. Under this definition National Oil Transport Co. was the owner *pro hac vice* of the *Agron* on the voyage in question. The Shipping Board finally parted with the vessel June 4, 1920. Thereafter until the judicial sale, the vessel was solely under the control, management, possession and navigation of National Oil Transport Co. Whether the United States with respect to its interest in the vessel is to be considered a former owner, who has parted with his title, as in the *Aspinwall* case, or one who has let his vessel to a time charterer and owner *pro hac vice*, as in the *Goodridge* and *Giles* cases, or a mortgagee out of possession, as in the case of *Morgan's Assignees*, we admit a doubt. In any event there is no liability for these wages.

Running through all of these cases, is the proposition that there can be no liability for wages without a contract of employment made directly or by an agent. In the present case the evidence is unequivocal that the Captain was not the agent of the United States or the Fleet Corporation.

SUIT CANNOT BE MAINTAINED UNDER ACT OF MARCH 9, 1920

This is known as the Suits in Admiralty Act

(1920 Sup. 2nd Ed. F. S. A. p. 253). Section 1 forbids the arrest of vessels owned or operated by the Government. Section 2 provides in part as follows:

“That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation.*”

Libelants rely on the Act of March 9, 1920 for their permission to sue the Government and the Fleet Corporation. The law in this circuit, we believe, requires them to have legislative permission in order to sue the Fleet Corporation as well as the Government.

Sloan Shipyards Corp. vs. E. F. C., 268 Fed. 624.

Astoria Marine Iron Works vs. E. F. C., 270 Fed. 635.

We contend that they are not permitted by this Act to maintain the present suit. The Court's attention is invited to the words of the Act as quoted above, which we have italicized, namely: “provided

that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation". The interest of the United States and the Fleet Corporation in the *Agron* has been one of manufacture rather than operation. The *Agron* was not employed as a merchant vessel by the United States or the Fleet Corporation at the time this suit was brought, or at the time the cause of action arose, or at any other time. The Government has never operated her and never possessed her as a completed vessel capable of operation.

The purpose of the statute is to permit the Government to be sued on causes of action arising through its operation of its Merchant Marine. The Act does not permit the United States to be sued on a cause growing out of operation of a vessel by the National Oil Co. or any other corporation not an agent of the United States, even though the hull of such vessel was originally built for the United States. The language of the Act herein emphasized seems to require that libelants must allege and prove that the *Agron* at the time the cause of action arose, or at the time suit was commenced, or at both of these times, was employed as a merchant vessel by the United States. The contrary appears in the

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record.

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United States
Circuit Court of Appeals⁹

For the Ninth Circuit.

Transcript of Record.

(IN THREE VOLUMES.)

ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

VOLUME I.

(Pages 1 to 334, Inclusive.)

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

FILED

FEB 20 1922

F. D. MONCKTON,
CLERK

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District of Alaska, Division No. 1.

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In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Complaint.

L

Plaintiff herein complains of defendant and for
his cause of action alleges:

I.

That during all the time herein mentioned defendant was, and now is, a corporation organized, existing and doing business as such.

II.

That continuously, and for a great many years last past, to wit, for a period of some thirty or forty years, the premises known and designated as Blocks "M" and "N" of the Townsite of Juneau, Alaska, said premises being situated on the upper or northerly side of Franklin Street, or lower

Front Street, so called, in the City of Juneau, Division Number One, Territory of Alaska, together with the adjoining and surrounding premises, have been used and occupied for business houses, rooming-houses, boarding-houses, residences, and for other general city purposes, and were so used and occupied on the 2d day of January, 1920. That on the said 2d day of January, 1920, this plaintiff was, and continuously for a great many years prior thereto had been, the owner of Lots 1, 2 and 4, in Block "M," aforementioned, said premises being situated between Franklin Street and Gastineau Avenue, in [1*] the City of Juneau, Alaska. That on the said 2d day of January, 1920, and for several years prior thereto, this plaintiff owned and maintained on the said premises a general store or mercantile building located on said Lot 1, and general store and mercantile building on Lot 2 aforesaid, an apartment house, and three rows of cabins consisting of eleven apartments, all of which premises were, during all of the said time, in the possession of this plaintiff and were used and occupied for the purposes designated.

III.

That the said premises are, and during all of the time aforesaid were, situated on the westerly slope of a steep and high mountain generally known and designated as Mount Roberts, and at or near the foot of said slope. That the grade of said slope upon which said premises are situated, and

*Page-number appearing at foot of page of original certified Transcript of Record.

from the lower side of said premises to the flume of the said defendant company hereinafter described, is approximately thirty (30°) degrees from the horizontal. That the said slope, during all of the time herein mentioned, was covered with a heavy layer of soil consisting principally of gravel, rocks, silt, clay and decayed vegetable matter. That said soil was so composed and so situated on said slope that in case it became heavily saturated with water, or in case water, in addition to the natural rainfall, would be deposited upon the surface thereof, it would slide downhill and thus and thereby destroy the aforementioned buildings, homes, warehouse, apartment house, cabins and other improvements situated on said Lots 1, 2 and 4 of Block "M," as well as surrounding lots and properties, and thus and thereby destroy the aforesaid premises, improvements and buildings owned and in the possession of this plaintiff, and destroy all the property in such buildings and houses, and kill or seriously injure occupants thereof, all of which facts as above set out, were at all times well known to defendant, its officers and agents.

[2]

IV.

That on and prior to the 2d day of January, 1920, the defendant company for its own benefit and for its own purpose, diverted a large quantity of the water from Gold Creek from its natural channel in Gold Creek Basin and conveyed the same to the westerly slope of Mount Roberts and did so by conducting said water by means of a

flume or conduit through a tunnel through Mount Roberts and to a point on the said slope directly above the aforementioned houses, homes, residences and other improvements above described, and at an elevation of approximately 410 feet above the waters of Gastineau Channel and at an elevation of some 380 feet above the aforementioned premises belonging to this plaintiff, which flume and conduit aforementioned had, prior to said 2d day of January, 1920, been constructed by the defendant company for the purpose of so diverting said water as aforesaid for defendant's own benefit and purpose, as aforesaid, and that the said use and diversion of said water by defendant commenced on or about the year 1914, and continued from the time of the construction of said flume until and after the said 2d day of January, 1920, and the said tunnel, flume and conduit, and all the means for the diversion and utilization of said water were constructed and installed by defendant, and during all of the time herein mentioned and since the beginning of said diversion, said flume, tunnel, conduit, and all other means used in the diversion, conveyance, storing and utilization of said water, were operated and maintained exclusively by, and were continuously in the exclusive possession, care, control and use of defendant, its agents and servants, until after the injury herein complained of.

V.

That defendant's flume or conduit described above, terminated at the penstock located on the slope above described and at an elevation of about

380 feet above the aforementioned premises and [3] improvements belonging to plaintiff, and that from the bottom of said penstock extended a pipe used and designated to convey and distribute the water to the places wanted by defendant for use, and which pipe will hereafter be referred to as the distribution pipe.

VI.

That the water so diverted by defendant as above set out, on the 2d day of January, 1920, while plaintiff was such occupant and owner of said premises and improvements aforementioned, and in possession thereof escaped and flowed from said flume or conduit and was, by the negligence of the defendant, caused or permitted to be or become deposited upon, and to flow over on to the said slope aforesaid, and over and upon said premises so used and occupied as aforesaid, and through and by the negligence of defendant such water so diverted from Gold Creek then and there flowed upon the said slope below said flume and saturated the soil upon said slope both above and underneath the said buildings and improvements, and above, through and over the said premises belonging to plaintiff, and thereby, and in that manner, and owing to the negligence of defendant aforesaid, caused the said soil on the said slope to slide down and upon the said buildings above described and belonging to plaintiff, and thus and thereby destroyed the said premises, houses, buildings, furniture, stock and equipment therein situated, as hereinafter more particularly described.

VII.

That the said waters so diverted by defendant as above stated, and which caused the injury herein complained of, was permitted, by the negligence of the defendant, to escape from the said flume and penstock and to be deposited upon the said slope as aforesaid, for the reason that there was more water conveyed through said flume to the said penstock than was carried away from the penstock by the distribution pipe, or otherwise. That the defendant negligently permitted more water to flow into said flume and to be conveyed by said flume to said penstock, than was taken away by the distribution pipe. That by constructing [4] and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the distribution pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises here in question, or otherwise occasion damage. That ordinary and reasonable care and caution on the part of defendant, required of defendant that it should have constructed and maintained at all times such waste flume to carry away such waste water, or surplus water, and defendant was negligent in failing to provide such precaution against injury from surplus or overflowing water at or near the penstock. That defendant was negligent in this: That it failed to provide and maintain a series of spillways along its said flume by

which spillways surplus water could and would be released from the flume before it reached the penstock. That the overflow water here in question, and which caused the damage herein complained of, was known to defendant to be so flowing and likely to cause said damage long prior to the occurrence of the slide complained of; or would, by the exercise of reasonable care on the part of defendant, have been so known by defendant long prior to the said slide and prior to any damage that would have been done by said water, and the defendant was negligent in not shutting off said water and preventing the said overflow before any damage was occasioned thereby, and defendant wrongfully and unlawfully permitted said water to continue to flow upon the said premises until after the slide complained of had been caused, and the said damage had been done.

VIII.

That at the time the defendant company originally diverted the said waters from Gold Creek and conveyed the same to the westerly slope of Mount Roberts, as aforesaid, the premises below the said flume and below the point to which the said waters were so conveyed by defendant, had been for many years prior to said diversion, occupied [5] and used for general and urban purposes, as aforesaid, and prior to the said diversion of said waters by defendant, the owners and occupants of said premises were in no danger whatsoever of having their property destroyed, or any other damage done by any waters from Gold Creek, or from any other nat-

ural flow of water. That by so diverting said water of Gold Creek and conveying the same to the westerly slope of Mount Roberts and to a place approximately 410 feet above the waters of Gastineau Channel, defendant company exposed all of said premises below said flume and so occupied for urban purposes, to grave danger of being destroyed or damaged by the escape of any portion of the waters so conveyed, and exposed the residents and occupants of said property or premises to grave danger of being killed by the escape of any water so diverted by defendant as aforesaid; and by so diverting said water as aforesaid to the westerly slope of Mount Roberts, as aforesaid, the defendant company assumed any and all responsibility for any damage caused by the said water in the event the same should escape and flow upon the said slope as aforesaid.

IX.

That in and by the slide which took place on the westerly slope of Mount Roberts on the 2d day of January, 1920, by the negligence, and wrongful acts of defendant, as above described, plaintiff's warehouse, apartment house and three rows of cabins aforementioned, were utterly destroyed, together with all the fixtures and furniture therein contained. That plaintiff's general store and mercantile building situated upon the aforementioned Lot 1 was broken and shifted on its foundation and the rear end thereof stove in and the whole thereof flooded with water, mud and debris; that all of his merchandise, stock and other property stored in the

said warehouse and belonging to plaintiff, were destroyed and a large portion of his mercantile stock in the said store was destroyed; that the rear end of plaintiff's said store building located on Lot 2 was broken in and the said building greatly damaged. That the said store building on Lot 1 was damaged in the sum of Fifteen Hundred [6] (\$1500.00) Dollars. That plaintiff's stock of merchandise in his said store and warehouse was damaged in the amount of Twenty-five Hundred (\$2500.00) Dollars. That the said warehouse was of the value of Fifteen Hundred (\$1500.00) Dollars and was utterly destroyed to the plaintiff's damage in the sum of Fifteen Hundred (\$1500.00) Dollars. That the said apartment house of plaintiff's was of the value of Eight Thousand Five Hundred (\$8,500.00) Dollars and was utterly destroyed to the plaintiff's damage in the sum of \$8500.00 That the furniture and equipment of said apartment house belonging to plaintiff was of the value of Two Thousand (\$2000.00) Dollars and was absolutely destroyed to plaintiff's damage in the sum of \$2000.00. That the aforementioned three rows of cabins containing eleven apartments were of the value of Three Thousand (\$3000.00) Dollars and wholly destroyed to plaintiff's damage in the sum of \$3000.00 That the aforementioned store building on Lot 2 was damaged in the sum of One Thousand (\$1000.00) Dollars and that the aforementioned premises on which said destroyed buildings were situated at the time, and prior to the said

slide, were damaged in the sum of Fifteen Hundred (\$1500.00) Dollars.

WHEREFORE plaintiff demands judgment against the defendant in the sum of TWENTY-ONE THOUSAND FIVE HUNDRED DOLLARS (\$21,500.00), together with his costs and disbursements herein.

JOHN RUSTGARD,
Attorney for Plaintiff. [7]

United States of America,
Territory of Alaska,
Division Number One,—ss.

Isadore Goldstein, being duly sworn on oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and the same is true as he verily believes.

ISADORE GOLDSTEIN.

Subscribed and sworn to before me this 17th day of August, 1920.

[Notarial Seal] JOHN RUSTGARD,
Notary Public for the Territory of Alaska, Re-
siding at Juneau.

My commission expires Oct. 8th, 1922.

Filed in the District Court, District of Alaska,
First Division. Aug. 18, 1920. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [8]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1990-A.

ISSADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Bill of Particulars.

Comes now plaintiff and in compliance with the order of the Court submits the following as his bill of the particulars, items of personal property referred to in his complaint and for which he claims damages, to wit:

General Merchandise in store consisting of	
groceries, boots, shoes, and clothing..	\$1500.00
Groceries in warehouse consisting of rice,	
bacon, hams, flour, beans, etc.....	1000.00
Furniture and fixtures in apartment house:	
4 Stoves at \$25.00	100.00
4 Kitchen ranges at \$100.00	400.00
10 Rugs at \$25.00	250.00
4 Beds with springs and mattresses at	
\$40.00	160.00
4 Tables at \$25.00	100.00
4 Dressers at \$30.00	120.00
20 Chairs at \$5.00	100.00
8 Sets light fixtures at \$10.00	80.00

Kitchen Utensils consisting of pots,	
pans and dishes	230.00
4 Sets linoleum at \$25.00	100.00
4 Bathtubs at \$35.00	140.00
4 Sinks at \$15.00	60.00
4 Wash-bowls at \$15.00	60.00
4 Toilets at \$25.00	100.00

Total \$4500.00

A more itemized or detailed statement cannot be furnished by plaintiff.

JOHN RUSTGARD,
Attorney for Plaintiff. [9]

United States of America,
Territory of Alaska,—ss.

Issadore Goldstein, being first duly sworn, deposes and says, that he is the plaintiff above named; that the foregoing bill of particulars is true and correct to the best of his knowledge.

I. GOLDSTEIN.

Subscribed and sworn to before me this 26th day of Nov., 1920.

[Notarial Seal]

JOHN RUSTGARD,
Notary Public.

My commission expires Oct. 8th, 1922.

Copy received this 26th day of Nov., 1920.

HELLENTHAL & HELLENTHAL,
Atty. for Deft.

Filed in the District Court, District of Alaska,
First Division. Nov. 27, 1920. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [10]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Referring to allegations on paragraph 1 the defendant admits that at all times in the complaint mentioned it was and still is a corporation organized, existing and doing business as such.

II.

Referring to paragraph II of the complaint, the defendant admits that the plaintiff occupied the premises referred to in the complaint as having been occupied by him and his predecessors for many years, and that they are situate in the town of Juneau at the place indicated in the complaint, but denies that the adjoining premises have been used for the purposes indicated, or for any other purpose whatsoever, during the period indicated,

but, on the contrary, avers that the same were not so used until within the past four or five years. The defendant admits that at the time mentioned in said paragraph the plaintiff entered and occupied the premises in said paragraph referred to as entered and occupied by the plaintiff on January 2, 1920.

III.

Referring to the allegations of paragraph III of the complaint, the defendant admits that the premises referred to were and are situate on the westerly slope of a steep and high mountain, known as Mount Roberts at or near the foot of said slope and that the grade of said slope from said premises to the flume line of the defendant company [11] is approximately 30° from the horizontal. The defendant denies that the entire slope of said Mount Roberts was covered with a heavy layer of soil, but avers that the slope of said mountain was covered, except at points where gulches and ravines occurred with a layer of soil composed largely of clay and rock. The defendant denies that the soil on said slope was so composed or so situated that, if it became heavily saturated, or if water in addition to the natural rainfall were added thereto or deposited upon the surface thereof, it would slide downhill either so as to destroy the buildings, houses, warehouse and other structures referred to, or at all. The defendant denies that the saturation of the soil mass on the slope of Mount Roberts, whether caused by rainfall or otherwise, would cause a landslide whereby the

improvements, buildings, or other property referred to in the complaint, would be injured, or whereby occupants of buildings would be killed or seriously or otherwise injured, and denies that the saturation of said soil mass however brought about would cause any slide whatsoever, and the defendant denies that either it or its agents or officers had, at the time mentioned in said paragraph, or at any other time or times, any knowledge of the matters and things referred to in said paragraph, or any knowledge that would lead it to believe that said soil mass, or any part thereof, so situated on the slope of Mount Roberts would slide if it became heavily or otherwise, saturated with water. On the contrary, this defendant avers that said soil mass had assumed a position of rest on said mountain side at the natural angle of repose, and that the same would remain at rest unless disturbed by the making of excavations, or by some other similar cause, whether brought about by natural or artificial means.

IV.

Referring to the allegations of paragraph IV, the defendant admits that on the second day of January, 1920, it was for its own benefit and for its own purpose diverting a quantity of water, which the defendant, however, denies was large, but was only sufficient to serve its purpose. The defendant admits that the water diverted by it was taken from Gold [12] Creek and conveyed by means of a flume line and ditch line along the slope of Mount Roberts and through tunnels to its

mill on the shore of Gastineau Channel, and that said flume line along its course passed above the premises referred to as the plaintiff's premises, and further that the waters flowing in said flume and ditch line were at the time mentioned used by the defendant and under its possession and control, except as hereinafter more specifically set forth in detail, and in this connection the defendant avers that the manner of the diversion of the waters referred to, as well as their application to use, is more specifically set forth elsewhere in this answer.

V.

Referring to paragraph V of the plaintiff's complaint, the defendant admits that its flume terminated at the penstock located on the slope of Mount Roberts at an elevation of about 380 feet above the premises referred to in said paragraph as the premises belonging to the plaintiff, but denies that a single pipe extended from the bottom of said penstock to the place or places of use and avers on the contrary that three pipes extended from said penstock to three distinct places of use and the said pipes were installed and used in connection with the conveyance of water and the distribution thereof to the various places of use, and in this connection the defendant avers that said pipes, as well as the ownership thereof, the use for which the same were designed and the purpose served by them is more specifically and in detail referred to elsewhere in this answer.

VI.

Referring to the allegations of paragraph VI of the plaintiff's complaint, the defendant denies that the water diverted by the defendant as set forth in the complaint, or any other water or waters under the control of the defendant, did on the second day of January, 1920, or at any other time, while the plaintiff was the occupant and owner of the premises referred to or at all, escape from or flow from the defendant's flume or conduit, or from any other device or devices in the possession or [13] control of the defendant and defendant denies that such water was, because of the negligence of the defendant, or at all, caused or permitted to become deposited upon or to flow over or on the slope of Mount Roberts, or over or upon the premises referred to or upon any other place or places whatsoever. The defendant denies that through, or by negligence of the defendant or otherwise, the waters so diverted from Gold Creek, or any other water or waters then and there or at all, flowed upon the slope below the defendant's flume or elsewhere, and defendant denies that water so flowing saturated the soil upon the slope of Mount Roberts, either above or underneath the buildings and improvements referred to, or at all. The defendant denies that water so flowing flowed through, over or upon the premises belonging to the plaintiff, or elsewhere, and defendant denies that in the manner alleged in said paragraph, or in any other manner due to the negligence of the defendant, or to any other cause, water so flowing from said flume or

diverting works of the defendant, or from any other device or devices under the control of the defendant, flowed upon soil on the slope of said Mount Roberts, and that because of this, or for any other reason connected with any act or acts of the defendant, the soil on said slope slid down upon the buildings referred to as those belonging to the plaintiff, or at all, and the defendant further denies that any premises, houses, buildings, furniture, stock or equipment situated as indicated in said paragraph, or elsewhere or at all, were destroyed by any slide or slides, or any other cause or causes whatsoever or set in motion by any act or acts of the defendant, whether negligent or otherwise, and denies that any act or acts of the defendant were the causes, either directly or indirectly of the destruction or injury of any of the premises, houses, buildings, furniture, stock or equipment referred to in said paragraph.

VII.

Referring to the allegations of paragraph VII of the complaint, the defendant denies that any water or waters diverted by it as stated in the complaint or otherwise were the cause of the injury referred to in [14] the complaint, and defendant further denies that any such water or waters were permitted by the negligence of the defendant or otherwise to escape from its flume or penstock and denies that any such waters were deposited upon the slope of Mount Roberts in said paragraph referred to or elsewhere; denies that such waters escaped or were deposited on said slope

as stated in said paragraph by reason of the fact that more water was conveyed through the flume to the penstock than was carried away by the penstock by the distribution pipe or otherwise. In this connection the defendant avers that no water whatsoever escaped from or flowed from said penstock, flume or other device under the control of the defendant until after the landslide therein referred to had already occurred as hereinafter more specifically set forth. The defendant denies that it negligently permitted more water to flow into its said flume to be conveyed by its said flume to its said penstock or otherwise than was taken away by the distributing pipe or pipes. The defendant denies that the construction or maintenance of a flume or conduit to confine and carry away to some safe place any water, which at any time for any reason might be conveyed to the penstock in excess of what the distributing pipe could or did carry away, could serve any purpose whatsoever in preventing water carried to the penstock from overflowing or being deposited upon the slope or premises referred to, or otherwise occasioning damage. In this connection the defendant avers that its distribution pipes had a greater capacity at all times than its flume so that no water could overflow from its said penstock, as is more specifically stated elsewhere in this answer. Defendant denies that ordinary or reasonable care and caution, or any degree of care and caution, on the part of the defendant whatsoever, required of the defendant that it should have constructed and maintained at all times or at any

time whatsoever such waste flume to carry away such waste water or surplus water, or any flume of any character designed for the purpose indicated in said paragraph, and defendant denies that it was negligent in failing to provide such precaution against [15] injury from surplus or overflowing water at or near its said penstock, or that it was negligent in failing to provide any such flume, or take any such precaution at any other point. On the contrary, the defendant avers that it exercised the highest degree of care in the selection, installation and maintenance of all the devices employed in connection with the matters referred to and denies that it was negligent in any particular whatsoever. The defendant denies that it was negligent in failing to provide or maintain a series or spillways along its said flume by which surplus water could or would be released from its said flume before it reached its said penstock. In this connection defendant avers that it installed, and at all times therein mentioned maintained, spillways wherever they could serve any useful purpose, and that it exercised the highest degree of care in this regard. The defendant denies that it ever had any knowledge of water overflowing, as mentioned in said complaint or at all, and avers that no such water did overflow. Defendant denies that it knew of water which was overflowing from its flume, penstock or otherwise prior to the occurrence of the slide complained of, and denies that it had any knowledge that water so flowing would be likely to cause damage, either prior to the slide or any other

time. Defendant denies that by the exercise of reasonable care or any other degree of care whatsoever, the defendant could or would have known that water so flowing as stated in said paragraph did so flow, and reiterates its denial that any water was so flowing from said flume or penstock or at all prior to the occurrence of the slide referred to. Defendant denies that it was negligent in not shutting off its water and preventing an overflow thereof before damage was occasioned thereby or at all, and it denies that it wrongfully or unlawfully permitted the water referred to or any other water to continue to flow upon said premises until after the slide complained of had been caused, or at any other time or at all, and denies that any water did so flow until after the slide had taken place and the damage referred to had been done. [16]

VIII.

Referring to the allegations of paragraph VIII, the defendant denies that all the premises referred to in said paragraph were prior to the diversion and appropriation of the waters of Gold Creek as in this answer stated, occupied for the purposes mentioned in said complaint, or at all, but, on the contrary, avers that at the time the water was so diverted and appropriated there were very few structures on the slope of Mount Roberts, or any where in that vicinity, and that the structures thereafter placed in that vicinity were placed there because the ground was made valuable by the activities of the defendant. The defendant admits, however that at the time it diverted and appropriated

the water, the plaintiff and his predecessors had entered and occupied a store building on Front Street, and some small cabins had been built in that vicinity, but the slope of the mountain, generally speaking, was unoccupied. Defendant denies that in diverting the waters and conveying the same to its mill site as stated, or otherwise, it exposed the premises below its flume line, whether occupied for urban purposes or otherwise, or whether occupied at all, to any danger of being either destroyed or damaged by the escape of any portion of the waters so conveyed, and denies that it exposed the residents or occupants of said property or premises, or any other person or persons whatsoever, to any danger of being killed or otherwise injured, by the escape of any water or waters so diverted by the defendant, or at all, and the defendant denies that by so diverting and appropriating the waters of Gold Creek the defendant assumed any and all responsibility, or any responsibility whatsoever, for any damage caused by said water in the event that the same should escape or flow upon the slope of Mount Roberts.

In this connection the defendant avers that by reason and because of its activities all property in the town of Juneau, and especially the property on the slope of Mount Roberts, and elsewhere in the vicinity of the defendant's plant, was greatly enhanced in value in that the defendant offered employment and opportunity for a large number of people [17] and added generally to the prosperity of the community, and that in all its said

activities it exercised the highest degree of care and that by reason of the exercise of such high degree of care it did not assume any responsibility for damage done by escaping water to any property so made valuable by it, or any other property whatsoever, should such water escape by an accident or other cause, which might happen notwithstanding its high degree of care and vigilance.

IX.

Referring to the allegations of paragraph IX, the defendant denies that by reason of any slide which took place on the westerly slope of Mount Roberts on the 2d day of January, 1920, or elsewhere at any other time, because of the negligence or unlawful act of the defendant, either as indicated in the complaint or at all, the plaintiff's warehouse, apartment house, three rows of cabins, referred to, were utterly destroyed or destroyed at all, or any part or parcel of the items of the property mentioned; denies that the fixtures or furniture contained in said structures were, because of any slide which was occasioned by the negligence or other unlawful act of the defendant, injured or destroyed. In this connection the defendant avers that while a slide occurred at the time and place mentioned, such slide was not due to any act or acts of the defendant, either directly or indirectly, and was not occasioned in the manner indicated in said complaint, or otherwise, except as hereinafter specifically set forth. The defendant denies that the plaintiff's general store and mercantile building situate upon lot one, as referred to in the com-

plaint, was broken and shifted on its foundation and that the rear end thereof stove in or was flooded with water, mud or debris; denies that all of plaintiff's merchandise stock and other property stored in said warehouse, or any part of said merchandise, stock or other property stored in said warehouse, whether belonging to the plaintiff or otherwise, was destroyed; denies that a large portion of plaintiff's mercantile stock was destroyed; denies that the rear end of plaintiff's store building located on Lot Two or elsewhere was broken in and that the said [18] building was damaged to any extent whatsoever. In this connection the defendant avers that if any of the property referred to was damaged or injured, such damage or injury resulted from a landslide caused in the manner hereinafter more specifically set forth, and not caused either directly or indirectly by any act or acts of this defendant, whether negligent or otherwise.

The defendant denies that the store building referred to as situated on Lot One was damaged in the sum of Fifteen Hundred (\$1500.00) Dollars, or any other sum whatsoever. The defendant denies that plaintiff's stock of merchandise in his said store and warehouse or elsewhere was damaged in the sum of Twenty-five Hundred (\$2500.00) Dollars, or any other sum or sums whatsoever. The defendant denies that the said warehouse was of the value of Fifteen Hundred (\$1500.00) Dollars, or of the value of any other sum or sums whatsoever, and denies that the same was utterly

destroyed or destroyed or injured at all to the plaintiff's damage in the sum of Fifteen Hundred (\$1500.00) Dollars, or in any other sum or sums whatsoever. The defendant denies that the apartment house, referred to in said paragraph of said complaint as the apartment house of the plaintiff, was of the value of *Eight Five* Hundred (\$8500.00) Dollars, or of any other value, and denies that the same was utterly destroyed or destroyed at all to the plaintiff's damage in the sum of Eighty-five Hundred Dollars, or in any other sum or sums whatsoever. The defendant denies that the furniture and equipment in said apartment house belonging to the plaintiff, or otherwise, was of the value of Two Thousand (\$2000) Dollars, or any other sum whatsoever, and that the same was absolutely destroyed or destroyed at all, to the plaintiff's damage in the sum of Two Thousand Dollars, or any other sum or sums whatsoever. The defendant denies that the three rows of cabins referred to in said paragraph as containing eleven apartments were of the value of Three Thousand (\$3000) Dollars, or of any other value whatsoever, and defendant denies that said row of cabins were wholly destroyed, or destroyed at all, to the plaintiff's damage in the sum of Three Thousand (\$3000) Dollars, [19] or any other sum or sums whatsoever. The defendant denies that the store building referred to as situated on Lot Two was damaged in the sum of One Thousand (\$1000) Dollars or any other sum whatsoever, and that the

premises referred to in said paragraph on which said alleged destroyed buildings were situated at the time, or prior to the slide, were damaged in the sum of Fifteen Hundred (\$1500) Dollars, or any other sum or sums whatsoever.

In relation to the denial of the valuation placed upon the buildings and articles of property enumerated in said paragraph, the defendant avers that it denies as above stated the valuations placed thereon, and denies that the same has any value whatsoever for the reason that it had no information or belief sufficient to form a belief in relation to the value thereof. And it specifically denies that any damage or injury sustained by the plaintiff on any account whatsoever was due to any act or acts on the part of the defendant whether negligent or otherwise, either directly or indirectly.

And the defendant further answering, AVERS:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, authorized to do and doing business in the Territory of Alaska, at and near Juneau; that the defendant has fully complied with the laws of the Territory of Alaska as to the domestication of foreign corporations, and has paid the annual license tax due the Territory of Alaska, January 1st, 1921.

II.

That it is engaged in the business of operating a mine situate some distance behind the Town of Juneau in the Silver Bow Basin, and generally

known as the Alaska Juneau Mine. That it operates a milling plant, for the reduction of the ores mined at its said mine, on the slope of Mount Roberts along the shore of Gastineau Channel. That in connection with the operation of its said milling plant, it has diverted some of the waters of Gold Creek and has conduits extending along the side of Mount Roberts and through a series of tunnels driven along the course of [20] said flume. That, at a point above the premises referred to in the complaint and described as the premises of the plaintiff, the waters carried by the flume are discharged into a penstock from which the same are distributed by means of distribution pipes to the places of use. One pipe, which belongs to and is maintained by the City of Juneau, leads to the water mains of the City of Juneau so as to make the water available for fire fighting purposes, another pipe leads to the power plant of the defendant where such portion of the waters as carried by said pipe are applied to use in the generation of electric power. The third pipe is of large dimensions and taps said penstock above the other two, and conveys all the water coming to said penstock not flowing through the other two pipes to defendant's milling plant where the same is applied to use. That said appliances are so constructed that said penstock, cannot overflow, and said flume and penstock, distribution pipes, and all other contrivances used in connection therewith, are the best and most approved devices known in connection with modern engineering, and the same

were, each and all, installed and maintained with the highest degree of engineering skill.

That, in order to prevent leaves, moss and other kinds of debris, from entering the distribution pipes, and occasioning interference or inconvenience in connection with the operation of machines fed by such pipes, either directly or indirectly, it was necessary and imperative that a screen should be so installed as to take from the water coming into said penstock, the moss, leaves and other debris, and for that purpose a revolving screen was placed at the opening of said flume in such a manner that the water coming therefrom would flow through said revolving screen and the moss, leaves and other debris would be separated therefrom and carried by said screen through a spout installed for said purpose, to the outside of the penstock above referred to. That the waters of Gold Creek are generally quite clear but do, on occasion, for one reason or another, contain moss, leaves and debris in sufficient quantity that the meshes of a stationary screen might become clogged and that, in order to overcome this difficulty, the revolving [21] screen as aforesaid, was installed, which was at all times kept revolving in such a manner as to keep itself clean from moss, leaves and other forms of debris, and permit the free and unobstructed passage of the water through it. That in order to accomplish this purpose, an electric motor was installed, which was supplied and driven with, and by, current coming from the electrical system maintained by the defendant. That said motor would

continue to keep said screen revolving, and, in that manner, to keep the meshes thereof from becoming clogged so as to allow the water to pass through the same freely, and that all the devices so installed were of the most approved type, and in all respects, sufficient for the purposes for which the same were designed, and were installed and maintained in accordance with the highest degree of care, foresight and engineering skill.

III.

That on January 2d, 1920, a slide occurred on the slope referred to in the complaint.

IV.

That the Alaska Gastineau Gold Mining Company maintained a tower on the area that forms part of the general mass that slid down the mountain side on the occasion referred to, and that high tension wires, owned and controlled by the last-mentioned corporation, were fastened to said tower, it forming a part of its general pole line on which wires were stretched to convey electric current. That the wires so designed to carry electric current, and owned and controlled by the said Alaska Gastineau Gold Mining Company, were in close proximity to a line of poles supplied with similar wires designed for like uses, and owned and controlled by the defendant company and others associated with it in that regard, and, at a point immediately to the southeast of where said landslide occurred, the wires of said Gastineau Company crossed the wires of the defendant and its said associates. That when said landslide took

place, the said tower of the said Gastineau Company situated on the slide mass, as above stated, was disturbed with a result that the wires of the said Gastineau Company and those of the defendant and its [22] associates, were brought in close enough contact to cause a short circuit on the defendant's lines, as a result of which the electric motors situate in the defendant's plant, including the motor designed and installed to drive the revolving screen above referred to, were stopped so that said revolving screen came to a standstill as a result of the slide aforesaid.

V.

That a short time prior thereto, another and different landslide occurred on the northerly slope of Mount Roberts in the vicinity of Wood's Gulch, which said landslide came from a point high up on the slope of said mountain, and was such that it could not be anticipated or foreseen, and consisted of a quantity of gravel and soil that slid down the side of the mountain, and in coming in contact with the flume and diverting works of the defendant situate at Wood's Gulch, so damaged the same and interfered with their operation, that a considerable quantity of surface water carrying moss, leaves and other forms of debris coming from the side of Mount Roberts at that point, found its way into the North Portal of what is known as No. 3 tunnel, and thence into the flume of the defendant hereinbefore referred to. That said landslide occurred just immediately prior to the landslide referred to in the complaint, and that steps were

immediately taken by the defendant to overcome the effect thereof, but that some of the debris consisting of leaves, moss and other loose materials lying on the surface of the mountain, had, notwithstanding the highest degree of vigilance exercised by the defendant, found its way into the flume as aforesaid, and that, by reason thereof and because of the unusual rains that had fallen immediately prior to the time of the slide referred to, the water coming from the flume and passing through said revolving screen, was highly charged with leaves, moss and other surface debris so that when the revolving screen came to a stop, as hereinbefore stated, the meshes thereof were quickly filled with debris so as to cause the waters coming from the flume, to, in part, flow over said screen instead of through the same, and find their way through the discharge spout installed and [23] designed for the purpose of enabling the tunnel screen to discharge the moss and debris taken from the water, to the outside of the penstock, as hereinbefore stated. That said water did not come from said spout designed to carry away the debris taken from the water by the screen, until after the screen had stopped and the meshes thereof had become clogged as above stated, all of which was due directly to the movement of the slide mass and the consequent interference with the electrical current supplying the motor *bb* which said revolving screen was driven, which said slide was an act of God over which the defendant had no control, and which the defendant could not, by exercise of

any degree of foresight, have anticipated or foreseen.

That the water so coming from said appliances of the defendant, did not, in any wise, occasion said slide, were not the cause thereof, either in whole or in part, and were not due to any negligence of the defendant, but occasioned as aforesaid, by causes beyond its control, and which were such that it could not foresee their occurrence.

And the defendant further answering, and by way of AFFIRMATIVE DEFENSE, AVERS:

I.

That the deposits of earth on the side of Mount Roberts at, and in the vicinity where the slide herein referred to occurred, were, and had been, for many years, in a state of rest and were so situated that unless disturbed or undermined, the same would remain in the position occupied by them on the mountain-side, in the absence of unusual, natural occurrences.

II.

That on the second day of January, 1920, and for a long time prior thereto, one Peter Koski, and his predecessors in interest, occupied a plot of ground on the slope of Mount Roberts immediately above the premises referred to in the complaint as the premises occupied by the plaintiff; that the said Koski and his said predecessors in interest, as well as his and their agents, servants and employees, made an excavation on the premises occupied by them and cut away a portion of the soil situate [24] on the slope of Mount Roberts at that point

in such a manner as to deprive the soil mass lying above said excavation and cut off its subjacent support so as to enable it to slide down the mountain-side and that the soil mass lying immediately above said cut and excavation so made and maintained was the mass that slid and formed the landslide referred to in the complaint.

That the said Peter Koski and his predecessors before him failed to place any bulkhead or bulkheads or any protection whatsoever in said cut or excavation at the point where the natural slope of the hill had been so changed, or at all, but, on the contrary, negligently made such excavation so as to remove the subjacent support from the mass lying above the same, and negligently failed to construct bulkheads or other structures with a view to supporting the mass from which the subjacent support had been so taken; and that the said Koski at all times in these pleadings mentioned, so negligently maintained said excavation, and so negligently failed to take any steps whatsoever to protect himself from landslides, or to support said mass by means of bulkhead or otherwise, or in any wise to supply any kind of device or devices whatsoever that would prevent said mass from sliding, and negligently failed to take any steps to retard or oppose the action of natural laws in establishing the equilibrium of the soil mass on the mountain-side disturbed by the making of such cut or excavation.

That on the 2d day of January, 1920, said mass having become saturated with water, which said

saturation resulted solely and entirely from natural causes, to wit, unusually heavy rains and melting snows, was absorbed by said mass until it became saturated and heavy, and it, having no support, its subjacent support having been taken away and removed by the said Koski and others connected with him as aforesaid, and no effort having been made to supply support by artificial means, thereupon slid down the mountain-side, the mass so sliding being coextensive with the excavation made as aforesaid. That the making and [25] the maintaining of said excavation, and the removal and consequent absence of the subjacent support that the hillside mass formerly had in its natural state, as well as the negligence of said Koski in failing to construct a bulkhead or other similar devices as aforesaid, were the sole cause of the slide above mentioned and referred to in the complaint.

WHEREFORE, the defendant prays that this plaintiff's complaint be dismissed, and that the plaintiff recover nothing by reason thereof, and that the defendant have judgment against the plaintiff for its costs and disbursements in its behalf incurred.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

P. R. Bradley, being first duly sworn, on oath deposes and says: That he is the agent and general manager of the defendant corporation; that he has

read the foregoing answer and knows the contents thereof and that the facts therein stated are true as he verily believes.

P. R. BRADLEY.

Subscribed and sworn to before me this 22d day of March, 1921.

SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Dec. 15, 1921.

Service admitted.

HENRY RODEN,
Of Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Mar. 22, 1921. J. W. Bell, Clerk.
By L. A. Green, Deputy. [26]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1990—A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant.

Reply.

Comes the plaintiff and for reply to the affirmative defense of the defendant denies and alleges as follows, to wit:

I.

Plaintiff denies that Peter Koski, deceased, and his predecessors in interest, or any other person, or at all, made any excavation in or cut away any portion of the soil situate on the slope of Mount Roberts at a point mentioned and described in paragraph 2 of said affirmative defense, or at any other point or at all; denies that said Peter Koski, deceased, or any other person, did any act or thing whatsoever which deprived any soil mass of its support and denies that the soil mass that slid and formed the slide in said paragraph referred to was situate immediately above the premises in said paragraph described.

Plaintiff denies that unusually heavy rains caused the mass of earth in said paragraph described to become saturated with water and that such saturation resulted from natural causes, but alleges the fact to be that such saturation was caused solely and exclusively by a large volume of water poured upon said mass and discharged from the penstock of defendant, as alleged in plaintiff's complaint; denies that said mass slid down on account of any act done or left undone by the said Peter Koski or his predecessors in interest or by any other person, except that said slide was caused by the negligent act of the defendant in maintaining it flume and penstock as set forth in plaintiff's complaint; denies that the [27] failure of said Koski or the failure of any other person to construct a bulkhead was the sole cause or any cause of the slide referred to and denies that the said

Koski or any other person was negligent in any way or manner whatsoever and alleges that no act, either of commission or omission, on the part of the said Koski or on the part of any other person, in any way, manner or form caused the said slide or contributed to the cause thereof.

Further answering the said affirmative defense plaintiff denies that the slide or damage complained of was caused by any negligent act of the said Koski or of his predecessors or of any other person, or by the combination of all or any of the acts or occurrences mentioned in paragraph 2 of said affirmative defense; denies that any of the acts, conditions and circumstances referred to in said paragraph caused, severally or collectively, or severally or collectively the said slide or damage complained of, and denies that any of the acts, conditions or circumstances referred to in said paragraph 2 contributed in any manner whatsoever severally or collectively, or severally or collectively, to cause said slide or the damage complained of and plaintiff alleges that *that* the said slide and damage by him complained of was caused as set forth in his complained filed herein and in no other manner.

WHEREFORE plaintiff prays judgment as in his complaint.

RODEN & DAWES,
Plaintiff's Attorneys. [28]

United States of America,
Territory of Alaska,—ss.

Isadore Goldstein, being first duly sworn on his oath deposes and says: I am the plaintiff in the within entitled action; I have read the foregoing reply, know the contents thereof and that the same is true as I verily believe.

ISADORE GOLDSTEIN.

Subscribed and sworn to before me this 31st day of March, 1921.

[Notarial Seal]

HENRY RODEN,

Notary Public in and for Alaska.

My commission expires July 24, 1922.

Receipt of copy of within reply is hereby admitted this 2d day of April, 1921.

HELLENTHAL & HELLENTHAL,

Defendant's Attorneys.

Filed in the District Court, District of Alaska,
First Division. April 2, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [29]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED That this cause came on regularly for trial before the above-entitled court on the 22d day of March, 1921; Plaintiff was present in person and by counsel, Henry Roden, Esquire, appearing for the plaintiff. The defendant also was present in person and by counsel. Messrs. Hellenthal and Hellenthal appearing as counsel for the defendant. The cause being at issue upon the questions of fact presented by the pleadings herein. A jury was regularly selected, empaneled and sworn to try the issues, and thereupon the plaintiff, to maintain the issues on his part, called as witnesses the following named persons:

Anderson, John	Goldstein, Isadore
Bach, Mrs. Anna	Gray, J. L.
Benson, W. J.	Guerin, E. C.
Berg, Hans	Hanson, Ole
Bradley, P. R.	Harri, Oscar
Bussey, Edwin E.	Harris, Frank
Connors, J. J.	Helsin, Charles
Crowther, H. P.	Higgins, Georgia
Douglass, Harry	Holst, Martin [30]
Dudley, John W.	Hyle, Ambrose
Forsythe, Al	Jackson, John
Frieman, Sim	Johnson, Jack
Gabie, C. A.	Kirk, Robert
Garster, Wm. M.	Larson, James
Geddes, Clarence	Larson, John
Geddes, Wm.	LeFevre, H. B.

Long, Lewis	Robe, L. S.
Manahan, W. J.	Simonson, Sam
Maynard, Wm. J.	Skuse, C. J.
Michaelson, Chris	Sonberg, Frank
Nelson, N. G.	Sorri, Fred A.
Nelson, Mrs. N. G.	Thompson, Emil
Newman, Fred	Torkleson, Geo. P.
Nichols, C. C.	Watts, Beatrice

—who each for himself, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as hereinafter appears, and the evidence of plaintiff's witnesses having been thus received, the plaintiff rested his case in chief.

Whereupon the defendant, to maintain the issues on its part, called as witnesses the following named persons:

Bauzman, L.	Dowling, Edward
Bendel, John	Eberhart, Mrs. Virginia
Benson, Amos	Grefe, Raymond F.
Beistline, R. E.	Hargraves, W. B.
Bland, Charles	Hayne, Mrs. George
Bradley, P. R.	Higgins, James E.
Brown, Bruce	Holmquist, Fred
Carlson, Charles	Holmquist, John
Casey, W. W.	Jensen, Gudman
Clauson, Victor C.	Jackson, George T.
Cook, N. B.	Johnson, W. G.
Cropley, Jake	Jorgenson, Geo. R.
Crowell, Ed.	Judson, T. B.
Davidson, Henry G.	Kelly, D. F.

Keeney, R. M.	Oswell, George
Kennedy, Robt.	Reck, John
King, John H.	Richards, John
Loveley, R. P.	Saum, George W.
Marshall, J. B.	Smith, Charles
McNaughton, John	Stewart, B. D.
Metcalf, Frank A.	Summers, M. B.
Metzgar, L. H.	Sutton, M. S.
Murphy, R. E.	Trelons, John
Newman, Wert	Winter, Lloyd V.
Nordling, H. G.	Young, R. R.

—who being each duly sworn to tell the truth, the whole truth and nothing but the truth testified in answer to questions as hereinafter fully appears. Each of the defendant's [31] witnesses so called having testified as is hereinafter narrated, the defendant rested its case.

Whereupon the plaintiff to further maintain the issues on his part and in rebuttal called the following named persons as witnesses:

Layton, Wm.

Summers, M. S.

Robe, L. S.

—who being each sworn to tell the truth, the whole truth and nothing but the truth testified in answer to questions as hereinafter more fully appears.

And thereafter the premises were viewed by the Court and jury, as hereafter especially appears, and thereupon, when the Court was reconvened, the plaintiff, to further maintain the issues on its part, recalled the witness, P. R. Bradley, who testified as hereinafter fully appears.

The evidence given by each and all of the witnesses above named on behalf of both the plaintiff and the defendant, as the same was given and adduced, is as follows: [32]

Testimony of John W. Dudley, for Plaintiff.

JOHN W. DUDLEY, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. You may state your full name.

A. John W. Dudley.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

A. About 18 years.

Q. What has been your profession during that time, or most of that time?

A. Civil engineering.

Q. Are you acquainted with what is known as Mount Roberts? A. Yes.

Q. Where is Mount Roberts located?

A. Southeast of Juneau.

Q. Is it in Juneau precinct?

A. In the immediate vicinity.

Q. Juneau precinct, Territory of Alaska?

A. Yes, sir.

Q. Are you acquainted with the flume and pipe line which leads from a place on Mount Roberts back of the town of Juneau—the flume leading to what is known as the Basin? A. Yes, sir.

(Testimony of John W. Dudley.)

Q. I wish you would describe generally the course which this flume takes.

A. The course of the flume is practically parallel to that of Gold Creek, from a point a mile and a half to the northeast of Juneau to the east side of a spur of Mount Roberts; there it empties its water into a ditch and flows through a tunnel through Mount Roberts—through the spur of Mount Roberts to [33] a point 400 feet above tide water and immediately south of the Juneau town site.

Q. This flume is used to carry water from Gold Creek to the place you have indicated now?

A. Yes, sir.

Q. Is it a flume all the way from the beginning to the end? A. No, sir.

Q. What changes are there in this water system?

A. As I have stated, the flume ends at the east side of the spur of Mount Roberts.

Q. How is the water carried through the tunnel there?

A. Through the tunnel it is carried in a ditch, and at the southwest portal—the old portal of the tunnel the flume is resumed.

Q. Can you give us an approximate idea, Mr. Dudley, as to the size of the flume as it emerges on the Juneau side of Mount Roberts and is carried along the mountainside for a distance?

A. The only place I have measured it is at what is known as the penstock—there it measured—the

(Testimony of John W. Dudley.)

outside measurements were 4 feet by 4 feet—that is, roughly.

Q. Roughly speaking? A. Yes.

Q. Where does this flume terminate on this side of the mountain?

A. The flume ran along the side of the mountain toward the southeast to some point above the Alaska Juneau mill—a branch from it left the main flume just outside the portal, ran from the northwest, crossing Portal Gulch—about 150 feet from the junction of the main flume it ran into a penstock.

Q. Describe this penstock, Mr. Dudley, as near as you can.

A. Well, it was a square rectangular tank about 9 and a half by eleven, with a housing over it, and a platform around the upper part of the penstock.

Q. Now, what is that penstock used for, do you know, Mr. Dudley?

A. To convey the waters which flowed through the flume just [34] described into a pipe-line, or two or three pipe-lines.

Q. How are those pipe-lines connected with this penstock?

A. My understanding is that there were three pipes,—two small ones beneath, and a 30-inch pipe, the 30-inch pipe being some distance above the bottom of the penstock.

Q. What is the object of this penstock—the purpose?

A. Well, it had a twofold purpose—one, to com-

(Testimony of John W. Dudley.)

pensate the momentary fluctuations of the water of at least one or two of the pipes; and it also acted as a means of collecting the water and forcing it through the pipe, to be used elsewhere.

Q. Acts more or less as a reservoir?

A. Yes, sir.

Q. And stabilizer? A. Yes, sir.

Q. Where does this big pipe you have spoken of lead to, do you know, Mr. Dudley?

A. It leads directly downhill to what is known as the administration building, the old concrete foundation on Gastineau Avenue.

Q. From there?

A. From there it turns almost at right angles and follows to the mill properties.

Q. What is it used for—mill purposes?

A. Yes, sir.

Q. Are you acquainted in a general way with the milling operations that are carried on down there?

A. Yes, in a general way.

Q. Do you know who this milling plant belongs to? A. Yes, sir.

Q. Who?

A. The Alaska Juneau Gold Mining Company.

Q. Do you know who the flume and penstock belong to?

A. They were built by the Alaska Juneau Gold Mining Company. [35]

Q. Do you remember about the time when they were built, Mr. Dudley?

(Testimony of John W. Dudley.)

A. I don't believe I can even state the year, Mr. Roden.

Q. Some five or six years ago?

A. Yes, some five or six years ago.

Q. Where this water is used in the mill, is it of any importance or consequence to have a steady flow of water there?

A. I should say it is of the utmost importance.

Q. And to insure that constancy of flow is one of the purposes of the installation of a penstock?

A. Yes, sir.

Q. Is there anything about the penstock, Mr. Dudley, where water may be discharged from it otherwise than from these pipes?

A. As the penstock was built there was a trough-like spout made of sheet iron, about 8 feet long, from which water and refuse might discharge.

Q. This spout was shaped, was it?

A. Roughly rounded, like a trough—in a trough-like shape.

Q. Where was that connected with the penstock, and how?

A. Near the top—at the top of the penstock proper and projected out from it—sloped at a considerable angle.

Q. Now, have you ever made a map or sketch showing the location of this penstock with reference to the town of Juneau and the mountain-side.

A. Yes, sir.

Q. When did you do that, Mr. Dudley?

A. On May 8th and the days following, 1920.

(Testimony of John W. Dudley.)

Q. That is when you made your actual measurements in the field? A. Yes, sir.

Q. Did you carry out those measurements and observations on the plat?

A. The plat was drawn from those measurements.

Q. Is this the plat that you prepared, Mr. Dudley?

A. That is a blue-print copy, yes, sir. [36]

Q. Now, I show you this map and I wish you would explain it as well as you can.

A. The map is based on Franklin Street,—the outer end of it, to the shed of the portal of the old tunnel at the other; immediately adjoining that is what was the change room, since removed; the branch flume that I spoke of is shown just at the edge of this portal shed, and crossing through the corner of the change room to the penstock, which is here represented, the pipe-line leading from the penstock to the Alaska Juneau mill goes straight downhill to a point just northeast of the old concrete foundation of the administration building, there turning and following the line of the hill; this represents Gastineau Avenue; this shaded portion represents the area covered by the slide; and the trail leading up from Gastineau Avenue is represented by dotted lines—leads up to a trail coming alongside the mountain to Second Street, and they branch here, or rather come together there, and go along up to the change room.

Q. I understand you to say there is a trail coming from the penstock leading down the hill and this

(Testimony of John W. Dudley.)

trail branches off here, one going up the mountain-side and another trail coming straight down?

A. Yes.

Q. Where did this trail coming straight down the hill lead to?

A. It led down to a point just a little ways above the administration building, there branched again going off to the eastern side, and one coming down the western side of the concrete foundation.

Q. This trail is marked here?

A. Marked trail.

Q. I know, but by what lines?

A. By dotted lines.

Q. I see some of these contour lines—I wish you would explain what these contour lines are—what they mean. [37]

A. These irregular lines are what are called contour lines, and a contour line is a line which follows the level—which follows the undulations of the ground at a certain level above some zero plane. In the case of this map the zero plane was the extreme high-water mark of Gastineau Channel, and each one of these contour lines represents a vertical difference in elevation of five feet, and the heavier lines 25 feet vertically. To illustrate now as to the contour, if that portion in that vicinity of this slide could be cut off level at a point, say, 200 feet above high-water mark of Gastineau Channel and you were to be immediately above that and looked down upon that portion so represented you would see the edge, and that portion would take the

(Testimony of John W. Dudley.)

form of the 200 foot contour line.

Q. Where these lines rise here on this plat what does that indicate on the mountain-side—these high points?

A. Those raises apparently are deep depressions of the ground, and those curving in the opposite direction, down hill, indicate elevations.

Q. So these high places on the map here—these contour lines, as a matter of fact, indicate a depression receding in the mountainside?

A. Yes, sir.

Q. And the lower places practically represent the protruding portions of the mountain-side—the high portions of the mountain-side?

A. Yes, sir.

Q. What does this area here indicate, Mr. Dudley?

A. This area which is shaded indicates the ground covered by the landslide which occurred on January 21, 1920.

Q. Now, I see you have marked in this slide area the locations of transmission lines and a tower here. I wish you would explain these transmission lines a little more fully, near the Koski house there.

A. There are three transmission lines crossing this slide area— [38] one belonging to the Alaska Juneau Company and two to the Alaska Gastineau Gold Mining Company, and they are indicated by these letters on this map.

Q. There is a tower indicated here—how did you

(Testimony of John W. Dudley.)

get your information as to the location of that tower?

A. The Alaska Gastineau Company had a serial number for each tower—each one of those steel towers I found the serial numbers of the towers adjacent to the north and south and knew what that was from their map found the actual distance in feet between the towers adjacent north and south.

Q. Do you remember approximately now about what the distance between the towers is?

A. I couldn't say—in the neighborhood of 350 feet.

Q. You have marked in the location of certain buildings there,—where did you get the information from which you based those sketches you made in there?

A. That information was given me by persons living in houses immediately adjoining.

Q. You were generally familiar with the situation up there? A. Yes, sir.

Q. And know whether those as you have marked them are approximately correct?

A. Yes, sir; I have known that locality for years.

Q. What is the direction of the drainage over this way here, Mr. Dudley,—that is, if there was any water draining from the mountainside how would it come down—how would it drain into Gastineau Channel?

A. In the immediate vicinity of this slide area, there are two natural drainage ways—one indi-

(Testimony of John W. Dudley.)

cated here—the upper left hand corner of the plat—and running downhill through the slide area; the other is one at which the portal of the tunnel emerged from the mountain, and that follows almost the trail—of course slightly curving to the eastward. That Portal Gulch, as it is known, has branched out and [39] below the penstock formed another little gulch in between that and the one on the upper left hand corner.

Q. Now, where you have described the location of the penstock and flume, up around in here, is that condition existing at the present time, or has it been changed? A. It has been changed.

Q. When was the change made, do you remember—about?

Mr. HELLENTHAL.—Oh, I guess that is immaterial.

Mr. RODEN.—Just so as to get the correctness of the map, is all I am offering it for.

Mr. HELLENTHAL.—We have the map at the time that he made it.

Q. This was the condition on May 7th or 8th, did you say? A. Yes, sir.

Q. Do you know how long those conditions had existed prior to that time?

A. The surface indications there were that there had been no material change at that time.

Q. Now, when you were up there, Mr. Dudley, did you make any examination of the ground to see whether you could see any indications of the running of water? A. Yes, sir.

(Testimony of John W. Dudley.)

Q. What did you do in that respect,—what did you find?

A. I found very plain indications of a stream or streams of water which could come from nowhere else except the spout from the penstock, and which I traced down through the brush in the trail and down the trail to and beyond the point of the slide.

Q. What indications did you find there?

A. The indications were, in the trail, the washing away of the fine sand—where a stream runs through a trail large stones and boulders are left and the sand is washed out. Through the brush the leaves, sticks, small stones and debris had been carried by the water and lodged against the grass and brush.

Q. You found this evidence leading below the spout that you have [40] described?

A. Yes.

Q. How is the country there, Mr. Dudley, as far as the drainage is concerned?

A. Right underneath the spout there is a pile of rock and some debris there.

Q. What I am trying to get to is this, where would any water coming from this property in a natural way, where would it drain to?

A. A very few feet of difference in the discharge would cause it to drain one way or the other. In this case the natural drainage under the conditions prevailing at that time is the direction of the flow as I found indicated on the ground.

Q. Now, from your map here, this is a protruding portion of the country, isn't it?

(Testimony of John W. Dudley.)

A. Yes, sir; that is a distinct ridge or hog-back.

Q. Where would this hog-back naturally drain to?

A. Drains to either side—water that flowed from its surface.

Q. What is the elevation of the penstock, Mr. Dudley?

A. At the spout I think 387 feet above high-water mark.

Q. And what is the elevation at a point about the top of the slide there?

A. About 231' or 2 feet.

Q. Now, I notice you have some numbers and figures in here, P-1 and P so and so—what do those indicate, Mr. Dudley?

A. Those indicate the position and direction in which photographs were taken by Mr. Adams, the photographer, on May 10th.

Q. Were you present when those photographs were taken? A. Yes, sir.

Q. I show you a photograph and ask you what that represents?

A. Represents a general view looking directly up the slide from Gastineau Avenue.

Q. You are acquainted with all these photographs?

Mr. HELLENTHAL.—The same ones we had before? [41]

Mr. RODEN.—Yes. I will offer this in evidence.

The COURT.—Are you going to introduce the plat, Mr. Roden?

(Testimony of John W. Dudley.)

Mr. RODEN.—Yes; I will offer the plat first.

Mr. HELLENTHAL.—No objection.

(Whereupon said plat was received in evidence and marked Plaintiff's Exhibit "A.")

Mr. RODEN.—I will offer this photograph now.

Mr. HELLENTHAL.—All right.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "B.")

Q. What does photograph No. 2 represent, Mr. Dudley?

A. No. 2 represents the slide area, taken from a point just above the site of the Koski house—just above the Bach house, which now stands on the south side of the slide area.

Q. The Bach house is still standing?

A. Yes, sir.

Q. The Koski house is gone?

A. The Koski house is gone.

Q. Where did the Koski house stand with reference to the Bach house?

A. Immediately north and practically parallel with it.

(Said picture was received in evidence and marked Plaintiff's Exhibit "C.")

Q. What does No. 3 represent?

A. Photograph No. 3 was taken from the south edge of the slide, looking directly up to the point where the first break of the ground occurred.

(Said picture was received in evidence and marked Plaintiff's Exhibit "D.")

Q. Number 4?

(Testimony of John W. Dudley.)

A. Number 4 was taken in the trail right at the head of the slide, showing the first break of ground—the break occurring in the trail itself. The camera was pointed to the westward.

(Said picture was received in evidence and marked Plaintiff's Exhibit "E.")

Q. Number 6?

A. Number 6 was taken a little farther up, looking toward the [42] northward—taken in the trail, showing the course of the water coming down where the trail looped, and the water followed the westernmost loop of the trail. Shows distinctly the water action there,—washing out the sand.

(Said photograph was received in evidence and marked Plaintiff's Exhibit "F.")

Q. Seven?

A. Number 7 was taken a little further above on the trail and looks downward to the street—was taken for the purpose of showing the water action—the washing out of the sand in the trail from in between the stones.

(Said photograph was received in evidence and marked Plaintiff's Exhibit "G.")

Q. Number 8?

A. Number 8 was taken just following the fork of the trail, looking in a northwesterly direction, showing just the emergence of the water from the brush and the action of the water in the trail itself.

(Testimony of John W. Dudley.)

(Said photograph was received in evidence and marked Plaintiff's Exhibit "H.")

Q. Nine?

A. Number 9 was taken at the same point as No. 8, looking in an opposite direction—looking down the trail, or rather down the course that the water took in the brush. Just above point 8 and 9 the water left the trail and cut across, and this shows how it went through the brush and piled up the small stones and debris against the log on the south side of the trail.

(Said photograph was received in evidence and marked Plaintiff's Exhibit "I.")

Q. Number 10?

A. No. 10 was taken at a point on the bank just above the trail, to the westward of the penstock.

Q. What does it show?

A. It shows the northwest corner of the penstock proper, the [43] housing above it, and the iron spout leading down from the penstock—the discharge spout.

(Said picture was received in evidence and marked Plaintiff's Exhibit "J.")

Q. Number 11?

A. Number 11 was taken almost opposite, on the south side of the trail, and shows a little more fully—directly—the spout and the penstock building.

(Said picture was received in evidence and marked Plaintiff's Exhibit "K.")

(Testimony of John W. Dudley.)

Q. Number 12?

A. No. 12 was taken from the trail at the northwest corner of the penstock platform, and shows the end of the spout projecting outward, and shows the pile of stone and debris immediately underneath it.

(Said photograph was received in evidence and marked Plaintiff's Exhibit "L.")

Q. Do you know what the grade or the slope of Mount Roberts is in the neighborhood of the slide area, Mr. Dudley?

A. I prepared a profile of the ground there on a line between the corner of the penstock and the north side of the old Goldstein building, and that indicates the slope of the mountain-side above the slide area to be between 36 and 37 degrees from the horizontal. At the slide area the bedding, or the new angle of the slide is about 28 degrees from horizontal. The angle indicated by the south edge of the slide is between 32 and 33 degrees.

Q. Now, I wish you would explain that profile map a little, Mr. Dudley.

A. The bottom base line is the horizontal plane I spoke of as the zero plane, the plane at extreme high water mark of Gastineau Channel. The heavy black line shows the surface of the ground; the lower one of the slide area indicates the new surface, or bedding, of the slide, the upper line [44] indicates the south edge of the slide. From that point on up—from the upper end of that slide area up the mountain it is the original surface of the

(Testimony of John W. Dudley.)

ground—along this line—this line is indicated by a red line on the blue-print.

Q. Now, what does this here indicate?

A. The horizontal line just to the right of the slide area and above the surface line indicates the position and elevation of Gastineau Avenue at that point.

Q. Can you indicate the position of the tower you have in this slide area here?

A. I haven't marked that on this. This profile map was constructed merely to show the relative angles and slope.

Q. What did you say that angle was?

A. At the slide area the new surface, or bed of the slide, about 28 degrees from horizontal; the the south edge of the slide between 32 and 33 degrees.

Q. Now, what was the capacity of this spout—this discharge spout, that you have spoken of with reference to the flume—the proportionate capacity, I mean? Can you estimate it?

A. Only in a general way.

Q. All right.

A. If all the water flowing into the penstock from the flume were to emerge at the spout, the spout would not carry it all.

Q. Now, you have been familiar with the topography and condition of this side of Mount Roberts, the place where this slide occurred, for some considerable time, haven't you, Mr. Dudley?

A. Yes, sir.

(Testimony of John W. Dudley.)

Q. What is that mountain-side composed of?

A. You mean the character of the soil?

Q. Yes.

A. It is loose clay, loam and sand—it is the breaking down of the country rock of the mountain-side.

Q. What is its ability to absorb water?

A. My judgment is that it would absorb water slowly and would [45] retain it for a considerable time—that is to say, if no drainage were provided it would drain off slowly.

Q. What is the formation—what kind of rock is the mountain-side, do you know?

A. You mean the—

Q. The geological formation.

A. I haven't examined it carefully.

Q. I think one of the witnesses testified it was schist. A. It is schist.

Q. Now, were you there at the time of the slide, Mr. Dudley?

A. I was there about 20 minutes or half an hour after it occurred.

Q. Did you see any water coming over the slide area at that time?

A. Yes, sir; quite a stream was coming over at the apex of the slide.

Q. Do you know where that stream of water came from?

A. Only by inference from the indications I found afterwards on the ground.

Q. What inference?

(Testimony of John W. Dudley.)

Mr. HELLENTHAL.—We object to that. Let him ask for the facts. He may tell what he saw, and he has already done that.

The COURT.—He has asked for the facts and he has asked for the indications.

Q. Did you see some water marks in this area, Mr. Dudley? A. Yes.

Q. I see some water marks here—what do they represent?

A. I have indicated right above the slide area two small streams indicating the water I found there in May, 1920, when I made the survey.

Q. Do you know where that water came from?

A. In one case it came from this natural gully or gulch just to the westward of the slide, flowed down through the slide, almost down to Gastineau Avenue, and then disappeared in the slide bed there; the other emerged from the slide material itself and trickled down just above where the old Koski house was, and there disappeared. [46]

Q. Was that bedrock water?

A. Apparently, yes, sir.

Mr. RODEN.—We desire to introduce in evidence the profile map.

Mr. HELLENTHAL.—No objection.

(Whereupon said map was received in evidence and marked Plaintiff's Exhibit "M.")

Q. I wish you would look at this picture, Mr. Dudley—what does that represent?

A. This picture represents the surface conditions of the ground prior to the time of the slide, with

(Testimony of John W. Dudley.)

the exception of the snow. My recollection is that there was very little snow at the time the slide occurred.

Q. Does that show the penstock and the conditions around the penstock as you found them?

A. Very distinctly.

Q. Does it show the tower you have marked in your slide area here? A. Yes, sir.

Q. Have you ever examined the hillside and mountain-side back of the penstock, Mr. Dudley?

A. Yes, sir, for a short distance.

Q. Is the grade there the same as below the penstock?

A. No, the grade is somewhat steeper.

Q. Considerably steeper?

A. Oh, a matter of a few degrees; yes.

Q. Now, did you ever see any indications of any slide having occurred above the penstock?

A. No, sir.

Mr. RODEN.—We desire to introduce this picture in evidence.

Mr. HELLENTHAL.—No objection.

(Whereupon said picture was received in evidence and marked Plaintiff's Exhibit "N.")

Mr. RODEN.—You may cross-examine. [47]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Dudley, you made your investigation—your survey, I think, in May, you said, didn't you?

A. Yes, sir.

Q. That is the May following the slide?

(Testimony of John W. Dudley.)

A. Yes, sir.

Q. And the conditions to which you have testified were the conditions which you found in May of that year? A. Yes, sir.

Q. And the photographs were also taken at that time, in May? A. On May 10th, yes, sir.

Q. That is all of these pictures that have been offered in evidence except the one picture that was last offered? A. Yes, sir.

Q. You know, I presume nothing about that. I am speaking now about the smaller pictures.

A. The smaller pictures, yes, sir.

Q. Now, Mr. Dudley, referring to your map here, Exhibit "A," what you call there, "The course of the freshet," that means the course that the water followed? A. Yes.

Q. And you could trace on the ground the place where water had flowed?

A. In May 1920, yes, sir.

Q. You could see that water had flowed along the line that you have indicated? A. Yes, sir.

Q. In the trail which you show upon your map here there was considerable wash? A. Yes, sir.

Q. The trail showed that considerable water had flowed in the trail itself? A. Yes, sir. [48]

Q. The sand was washed away? A. Yes, sir.

Q. And the larger boulders were there?

A. Yes, sir.

Q. Right at this point, at the upper end of the slide, you found a sharp bend in the trail, didn't you? A. Yes, sir.

(Testimony of John W. Dudley.)

Q. And you also found that the edge of the trail there had followed down somewhat lower than the level of the surrounding country, didn't you—right here—right above the slide—wasn't the edge of the trail somewhat depressed there?

A. The southwestern edge of the trail—the lower edge of the trail on either side of the break showed that there never was any rise in the land there,—in other words, the ground naturally sloped—

Q. Yes, the ground naturally sloped down?

A. Yes.

Q. Now, at that point you could see that some water had flowed over and slopped out of the trail and flowed up towards the apex of the slide? There were evidences that water had flowed—

A. Over the edge, yes, sir.

Q. Now, the evidences consisted of the fact that the grass was matted and was lying down—is that not true?

A. And filled with leaves, sticks and debris.

Q. And there was some wash material lying on the ground? A. Yes, sir.

Q. There was no cut or abrasion in the soil whatever? A. Not at that point.

Q. The only evidence that water had flowed there was that the grass was matted, and there was some leaves and moss and stuff of that sort that had washed down with the water? A. Yes, sir.

Q. In the trail above that there was evidence that the ground had washed away?

A. Yes, sir. [49]

(Testimony of John W. Dudley.)

Q. Indicating a considerable flow of water in the trail itself? A. Yes, sir.

Q. That flow in the trail, however, would consist of all the water that had ever flowed down that trail prior to the time you made your examination, wouldn't it?

A. I shall not attempt to say it was all—it was the greater part of it, certainly.

Q. What I mean, Mr. Dudley, the trail had been there for some time? A. Oh, yes.

Q. And the water occasionally ran down there, with heavy rains, and so forth?

A. Yes, sir.

Q. And that would tend to make the condition you found on the ground? A. Yes, sir.

Q. But up the trail you found no evidence of water slopping off to the gulch to the westward?

A. No, I found no indication of the water going in that direction.

Q. You did find indications of the water going into Portal gulch? A. In two places.

Q. Now, the lowermost place where the water slopped out of the trail and went in the direction of Portal Gulch was about how far above the top of the slide—the apex of the slide?

A. About 80 feet on a level—would be more on a slope.

Q. How much would it be on a slope, Mr. Dudley? A. About 85 or 87 feet.

Q. Between 80 and 90 feet?

A. Between 80 and 90 feet; yes.

(Testimony of John W. Dudley.)

Q. A little less than a hundred feet?

A. Yes, sir.

Q. Where was the next place where it slopped over towards Portal Gulch?

A. Just a short distance below where it emerged from the penstock. [50]

Q. That would be approximately how many feet from the apex of the slide? I am speaking only approximately, Mr. Dudley—I don't want actual accurate measurements on that point.

A. About 140 or 150 feet.

Q. Those were the only two points, that is, aside from the other point to which you have referred at the apex of the slide—those are the only two other points at which the water had left the trail?

A. Well, as that is indicated on the plat, Mr. Hellenthal, the water left the trail at several points, cutting across bends of the trail—

Q. I know, but where you had—

A. But where it flowed away from it and did not return to the trail, there were only two points.

Q. And those points that you have referred to where the water cut across the bend of the trail were higher up?

A. They were all around from the apex of the slide to the trail.

Q. But that water there, it slopped over and simply made a short cut and then came back into the trail? A. That is it.

Q. In these places where the water slopped over into Portal Gulch, at these two points, there the

(Testimony of John W. Dudley.)

evidences of running water were just the same, approximately, as they were at the apex of the slide, were they not?

A. Indicated by leaves, sticks and debris, and the mat of the grass.

Q. There was no abrasion or cutting of the soil?

A. No, not apparent.

Q. At the point where the water flowed from the spout at the penstock, the water flowed down over the surface in one stream until it got some distance from the spout, did it not, towards the trail?

A. No, it was but a short distance below the spout where the stream apparently divided and formed a loop. [51]

Q. And then came together again into the trail?

A. Came into the trail.

Q. And you also traced that by the same evidences—that is to say, you saw leaves and sticks on the ground?

A. On one side of that loop there were evidences of a cutting, where water had gone over and scoured into the surface—it wasn't very great—and that was practically the only point that I saw it—two points there.

Q. Now, between the spout and where the loop commenced the water all flowed in one channel, did it not? A. Yes, sir.

Q. At that point there were no evidences that the water had scoured the ground at all? A. No.

Q. There wasn't any abrasion of the soil whatsoever? A. No.

(Testimony of John W. Dudley.)

Q. That is true, isn't it?

A. That is true; yes.

Q. The only way you have of tracing the course of the water there was by the leaves and debris that had been left on the ground as the water flowed over?

A. By the water action; yes, sir.

Q. There were evidences of moss and leaves such as would come from this penstock spout left along the course of the water—that is true, isn't it?

A. And sticks and sand.

Q. Sticks and things of that kind?

A. Yes, sir.

Q. And they evidently had been washed from the spout, where they had been deposited from the penstock? A. Yes.

Q. Now, that trail, Mr. Dudley, runs right over the center of the hog-back, doesn't it—that is, approximately?

A. Approximately, yes. [52]

Q. It slopes from both sides—the hog-back slopes down in both directions, does it not—in a northerly and southerly direction from the trail?

A. Yes, sir.

Q. There is a gulch on the northerly side of the trail and a gulch on the southerly side—that is true, isn't it? A. Yes, sir.

Q. Now, the natural drainage of water coming from that spout, if it were not for that trail holding it, would be in the direction of either one or the other of those gulches, would it not?

(Testimony of John W. Dudley.)

A. Unless something interfered with it, yes.

Q. If there were nothing on the ground to keep that water right on that hog-back it would run in one direction or the other, wouldn't it?

A. Yes, sir.

Q. It would immediately as it left the spout find its way to the lowest level of one gulch or the other? A. Yes, I would say that is true.

Q. And the only reason it flowed over the hog-back was because there was a trail there for it to run into—that is right, isn't it?

A. It would never have gotten into the trail unless something threw the water into the trail—having found the trail, it followed the trail.

Q. There might have been a sand bank, or something like that. A. Yes.

Q. But had there been no sand bank it would never have reached the trail, would it,—the natural drainage would have taken it one way or the other?

A. Probably so.

Q. In the slide area itself you found a spring—pretty well up towards the head of it, didn't you—a bedrock spring?

A. A flow of bedrock water, yes, sir.

Q. That was pretty well above the head of the slide—above the [53] Koski property?

A. Yes, sir.

Q. And then you found another place where the water ran over the slide area from this gulch?

A. Yes, sir.

Q. Indicating that the course of the slide was

(Testimony of John W. Dudley.)

lying across the gulch as it had originally been—
isn't that true?

A. You wouldn't say across the gulch, Mr. Helenthal.

Q. Well, in the gulch—the debris was lying in the gulch?

A. The debris was lying in the gulch, yes, sir.

Q. And the water in the gulch ran over the slide debris instead of running in its natural channel, because the slide debris was in the gulch?

A. Yes, sir.

Q. And the slide area as indicated by you on the map, Mr. Dudley, indicates the area that is covered by debris, isn't that true? A. Yes, sir.

Q. Wherever there were evidences of slide material you have indicated it as part of the slide area? A. Yes, sir.

Q. And it doesn't indicate the chunk that broke off?

A. I couldn't say that from the indications I found at the time I made my survey.

Q. You couldn't tell where the chunk was that broke off—whether it was just where you have indicated it or not? A. No, sir.

Q. The only thing you can indicate on your map is what you found of slide material lying on the ground?

A. Except at the upper end, of course—at the upper end.

Q. At the upper end you could tell?

(Testimony of John W. Dudley.)

A. The original land was broken away—there was no debris lying there.

Q. I mean with the exception of the broken part— A. That is true.

Q. And the gulch strikes the slide area at the point where you [54] have indicated by the contour lines?

A. Yes, sir.

Q. That is, if the gulch ran straight down originally as indicated on the map—followed the course indicated, about, oh, a third of the area that you have indicated as slide area would lie in the gulch, wouldn't it? A. Just about, yes, sir.

Q. About a third, and the area that slid would probably be about two-thirds of that?

A. Yes, sir.

Q. Now, coming to the penstock, Mr. Dudley, that was a square box built there at the end of the flume, wasn't it? A. Yes, sir.

Q. A sort of a box affair? A. Yes, sir.

Q. The spout that you have indicated was some distance from the bottom—how many feet, about, would you think? A. 9 or 10 feet, I would say.

Q. A considerable distance from the bottom, anyway? A. Yes, sir.

Q. The pipes leading from the penstock were right on the bottom of it, were they not—the service pipe? A. The large pipe, you mean?

Q. Well, there were two small pipes right on the bottom and a large one on the top?

A. I didn't see the small pipes at all—I merely

(Testimony of John W. Dudley.)

saw the large one, and that was a foot or a foot and a half above the bottom.

Q. And the other pipes had room enough to occupy the space below the large pipe. Now, if the large pipe were large enough, Mr. Dudley, to carry as much water as you could get into the penstock from the flume, then the water could never rise above the level of the large pipe—that is true, isn't it?

A. Provided the pipe had a free outlet. [55]

Q. If it were open, of course? A. Yes, sir.

Q. And the water could never rise to the level of that spout? A. I should judge not.

Q. Now, you know, Mr. Dudley, that the Alaska Juneau people have an equalizing tank to equalize the flow of water in the mill, don't you, or are you not acquainted with that?

A. I know the tank is there for that purpose, apparently.

Q. There is a large tank in the mill itself that is used to equalize the flow to the various places of use? A. Yes, sir.

Q. And the large pipe that leads from this penstock leads to that tank? A. Yes, sir.

Q. Now, under those circumstances there is no occasion for equalizing the flow at the penstock, is there? A. In the large pipe, no.

Q. The flow would be equalized at the mill tank?

A. Yes, sir.

Q. Then your testimony with reference to the use of penstocks, when you were testifying, applied

(Testimony of John W. Dudley.)

more to penstocks generally than to this penstock, is that not true?

A. It was a general proposition, yes, sir.

Q. And you were not testifying as to what this particular penstock was used for? That, of course, you have no knowledge of?

A. As I said before, the smaller pipe, the lower pipe, as I understood, was for the purpose of supplying the boiler water at the power plant—a very small pipe—and you can see that the fluctuations would probably be equalized by the small amount of water which might lie in the bottom of that penstock, below the lower edge of the large pipe. In other words, a foot or two of water would permit a sufficient equalization of that pipe—it would function as a reservoir or penstock; so far as the large pipe was concerned, however, it might not be. [56]

Q. As far as the boiler feed water is concerned, there would be no particular need of steadying that flow, Mr. Dudley?

A. No, not as long as there was enough to keep the pipe filled.

Q. You would not bother about that if you were building a penstock? A. No.

Q. The only use this penstock served, Mr. Dudley—this particular penstock, under the conditions I have just referred to, would be as a funnel to take the water into the pipe, isn't that right?

A. That is right, yes, sir.

Q. The spout you have referred to was a sheet-

(Testimony of John W. Dudley.)

iron spout, wasn't it? A. Yes, sir.

Q. Looked like a tin spout?

A. It was a heavy sheet-iron spout.

Q. Now, in the penstock at the same elevation as the spout, was a trommel screen—a revolving screen, was there not?

A. That I know nothing of. It was not there, or I was not able to see it at the time I made the survey.

Q. You were not in the penstock?

A. I understood there was such a device there but I had never seen it.

Q. You did not examine it yourself?

A. No, sir.

Q. You know, however, that a penstock would have some such device? A. Yes, sir.

Q. Every penstock you know of has some screening device? A. Yes, sir.

Q. And you know there would have to be some spout to take the leaves and sticks out of the penstock? A. Yes, sir.

Q. And this spout was evidently for that purpose, was it not? A. Yes, sir. [57]

Q. There were some evidences on the ground, I think you said, of debris that had been taken out by the spout, at the time you were there?

A. Quite a little pile of stones there.

Q. And some leaves and moss?

A. Sticks and small pieces of timber—sticks and leaves and moss and stuff of that sort.

Q. General mass of debris that had been thrown

(Testimony of John W. Dudley.)

from the water? A. Yes, sir.

Q. Showing what the use of the spout and the screen was?

A. Yes; with the exception of the stones, perhaps.

Q. Now, I think you have already testified at this particular point the drainage was such that unless there was something there, as sand bank or something of that sort to sheer the water off, it would run one way or the other? A. Yes, sir.

Q. Now, as for the material on the mountain-side, Mr. Dudley, that is a clay substance, I believe you have testified—a clayish kind of soil mixed with some silt that would naturally deposit there from decaying vegetation?

A. Yes; and a certain proportion of small rock from the water action.

Q. The soil mass on the hillside is a clayish sort of soil, mixed with silt, I think you said, and with rock? A. There was some rock in it.

Q. And the rock was such as would break off the side of the mountain from time to time as a result of the action of the elements?

A. Yes; there was some of the rock which showed water action.

Q. And most of them were boulders of various sizes with sharp edges—that is true, isn't it?

A. Yes.

Q. And the soil, I think you said, being of a clayish character would hold a great deal of water and retain it a long time [58] if it once got in—that is true, isn't it? A. Yes, sir.

(Testimony of John W. Dudley.)

Q. But it would be slow to absorb it, that is true, isn't it? A. Yes, that is true.

Q. Water running on clay will not be absorbed by it readily, but if it once gets in it will hold it a long time, that is true, isn't it? A. Yes, sir.

Q. And that is the condition on the mountain-side? A. Yes, sir.

Q. You don't know how much below the penstock the mill tank is, in elevation?

A. Not exactly, no.

Q. You never made any examination of that?

A. No.

Q. Now, referring to the cross-section map, Mr. Dudley, Exhibit "M," this shows a piece of ground—the distance between that straight line and the curved line, indicates the approximate chunk of ground that formed the slide mass, is that right?

A. Approximately, yes, sir.

Q. Where is the Koski house on that, Mr. Dudley?

A. I can indicate approximately. This profile map was not drawn for the purpose of showing any location—it was merely to approximately determine the angle of the slope. I imagine the Koski house would be about in here. Here the ground is somewhat more level—I think it was somewhere in here, like that.

Q. In drawing your contour map as well as this one, you placed the Koski house in a cut about 15 feet deep, is that not it, Mr. Dudley, from the slope that is indicated on the mountain-side?

(Testimony of John W. Dudley.)

A. I did not place it with reference to any cut, Mr. Hellenthal.

Q. I know. The lower edge of the Koski house was about 15 feet below the general slope of the mountainside—that is right, [59] isn't it,—no matter whether it was by reason of a cut—

A. I couldn't say that.

Q. Didn't you so testify before, Mr. Dudley?

A. I testified that there were indications that an excavation might have been made there.

Q. Yes, exactly,—and the excavation would be about 15 feet deep, wouldn't it?

A. Possibly 15 feet.

Q. And your maps are made upon that basis, are they not?

A. Oh, no; my maps are made without any reference to any cut there.

Q. I know, but your maps are so made that the lower floor of the Koski house, at the point where the Koski house met the bank, was about 15 feet below the slope of the mountain—that is true, isn't it?

Mr. RODEN.—We object to the question as not being cross-examination; there is nothing at all here about any cut.

The COURT.—The objection is overruled.

Q. That is true, isn't it, Mr. Dudley?

A. No, not exactly, Mr. Hellenthal.

Q. What is the exact truth?

A. The exact state of affairs is that I determined instrumentally what the contour of the ground was

(Testimony of John W. Dudley.)

at the point where I was informed the Koski house had stood, and then my information from those living adjacent to it led me to place the site of the Koski house where I did. It had no reference to any cut whatever.

Q. No, but the site of the Koski house as placed upon your map here, was so situated upon the ground that the upper edge of the foundation, the edge towards the mountain, was about 15 feet below the general slope of the hill—that is true, isn't it, as you have placed it upon your map?

The COURT.—Below the surface?

Mr. HELLENTHAL.—Below the surface, yes.

A. I don't think that is the case,—I wouldn't want to say that, Mr. Hellenthal. [60]

Q. What width did you give the Koski house of this map, Mr. Dudley? A. About 40 feet.

Q. And then there was a sidewalk about 6 feet wide on the end of it, wasn't there?

A. I was so informed.

Q. That would make the house and the sidewalk about 46 feet? A. Something like that.

Q. And the lot upon which it stood was about 50 feet? A. Fifty feet.

Q. So the house and sidewalk occupied the entire lot with the exception of about 4 feet?

A. Yes, sir.

Q. I want to refresh your memory, Mr. Dudley, with reference to your testimony,—I am not doing this to impeach you—it is merely to refresh your memory so that we can understand each other. I

(Testimony of John W. Dudley.)

don't want either you or the jury to think that I am trying to impeach you. Now, at the previous trial, when you testified in answer to questions, did you not testify as I am reading to you: "Q. That would place the house in a cut about 15 feet deep from the top of the surface as it originally stood, would it not?" Your answer was: "Probably so at the back corner." Is that right, Mr. Dudley?

A. Will you please read the answer given just before that, Mr. Hellenthal? I don't quite get the connection there.

Q. All right, I will have to read a couple of more answers so as to make it perfectly clear and to be perfectly fair with you: "Q. Now, did you plat the stairway on there, Mr. Dudley, that was on the westerly side of the house? A. The stairway that existed at the time I made the survey had been rebuilt, I think, by the Bachs, who had a house directly opposite. Q. Not on the east—on the other side, Mr. Dudley. A. No, I did not plat that. Q. That would be an addition, then, on the Koski lot? A. Yes, sir. Q. You know that stairway was about 6 feet wide, do you not? A. Yes; I have seen [61] such a stairway there. Q. That would make the house about 46 feet? A. Something like that. Q. And the house stood on this westerly side, right near the boundary line of the lot, did it not? A. I cannot state that definitely. Q. That is about the way you have it platted, isn't it, as being near the westerly boundary? A. Being near the westerly boundary, yes, sir, as far as I could determine.

(Testimony of John W. Dudley.)

Q. And the stairway would extend to near the westerly boundary—I mean not a great distance from the western boundary line? A. Probably not—it was not in existence when I made the survey. Q. In determining the elevation from the Koski house to the penstock, Mr. Dudley, at what level did you place the foundation of the Koski house,—how much of an excavation did you allow for that? A. I had only the information given me by those living in the house directly opposite there that the Koski house had about the same elevation as the Bach house, which is still standing, and I took the elevation there as $109\frac{3}{4}$ feet above high-water mark. Q. That would place the house in a cut about 15 feet deep from the top of the surface as it originally stood, would it not? A. Probably so at the back corner. Q. At the back corner, that is what I mean. A. Yes. Q. That is, the cut was about 15 feet deep at the back side of the house? A. That was my information, yes, sir. Q. And your calculations in determining the elevation of the house above sea level are based upon the proposition that a cut 15 feet deep had been made for the foundation? A. Yes; as I say, that was the only way I could determine, even approximately, what that was, was the information given me by those residents.”

A. That is enough, Mr. Hellenthal—I understand now.

Q. That was right, wasn't it, Mr. Dudley?

A. That was right, yes, sir.

(Testimony of John W. Dudley.)

Q. The best information you had was that there was a cut about 15 feet deep? [62]

A. Yes, sir.

Q. And you based your calculations in making your survey upon that hypothesis, in locating the Koski house on the map—in finding your elevations?

A. The cut was incidental to the location, yes.

Mr. HELLENTHAL.—Yes, certainly. That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. The location of the Koski house is not shown with relation to any cut on any of these maps, is it?

A. No, sir.

Q. Is it customary, Mr. Dudley, in the construction of a penstock to make some arrangements to take care of any possible overflow?

Mr. HELLENTHAL.—We object to that, your Honor,—what is customary. It might be competent to say what is proper, if Mr. Dudley can show where there would be any likelihood of an overflow—it might be,—and it is not redirect examination.

The COURT.—It is not redirect examination.

Mr. RODEN.—Probably not—Mr. Hellenthal developed that Mr. Dudley knows all about penstocks,—I don't care.

The COURT.—You may ask the question, but it opens it up to recross-examination.

The WITNESS.—It is good engineering practice

(Testimony of John W. Dudley.)

to provide an outlet, spillway or wasteway in all reservoirs and penstocks.

Q. Under the conditions as they existed up here, would that have been good engineering?

A. Yes, sir; that would have been a good, safe precaution.

Q. Would have been a good, safe precaution?

A. Provided a spillway which would conduct any possible overflow of water from that penstock to a natural drainage channel where it would reach tide water, without damaging any property.

Mr. RODEN.—That is all. [63]

Recross-examination.

(By Mr. HELLENTHAL.)

Q. Now, Mr. Dudley, that would be a penstock where there would be a chance of water going over the top of it, isn't that true? A. Yes.

Q. Now, if you have a penstock where the service pipe leading from the penstock is kept wide open and is larger and has a greater capacity than the flume running into it, would there be any possibility of an overflow?

A. There might be, Mr. Hellenthal, if the screening device were so clogged up that the water couldn't flow from the flume into the penstock and had to go over the screen.

Q. There would be no possibility of an overflow excepting something happened to the screen, is that not true? A. That is probably true, yes.

Q. If there were no clogging of the screen there

(Testimony of John W. Dudley.)

there would be no possible chance of any water getting out of the penstock?

A. Not under the conditions you have described.

Q. And there would be no occasion for any overflow? A. Not in that case.

Q. And if you had a screening device that was so built—8 feet long, and driven by the safest power that can be had, and revolving, there would be no reason to anticipate that that thing would ever get clogged, would there?

A. Unless something happened to the motive power.

Q. Unless something happened to the motive power it would not stop? A. No, sir.

Q. And as long as it kept running there would be no possible chance for the water to get out of it?

A. No probable chance.

Q. The only thing that would come out of it would be the leaves and the moss?

A. Yes, sir; under ordinary working conditions.
[64]

Q. Now, if you built a flume or anything else under that moss and debris spout it would immediately fill up with moss and debris, wouldn't it?

A. In the course of time—a longer or shorter time, yes.

Q. It wouldn't carry any water, would it?

A. Not unless the water overflowed through the spout.

Q. The thing would be full of debris, and the flume would be simply a place—a catch-all for moss

(Testimony of John W. Dudley.)

and debris, isn't that right?

A. Unless it was kept clean.

Q. Yes, unless you kept a man there to keep it clean. Now, it is just as possible that the flume would break at any point, isn't it,—a flume might break anywhere, might it not? A. Oh, yes.

Q. Those things happen? A. Yes, indeed.

Q. Wouldn't you think it safe engineering, or proper engineering, or intelligent engineering, for a man to build a second flume under the other flume to catch the water in case of a break in the flume?

A. No, sir.

Q. Oh, you wouldn't think it would be good engineering to build a second flume? A. No.

Q. And yet that flume would eventually fill up—the flume you would build at the penstock,—it would eventually fill up with moss and stuff if the trommel screen kept revolving and the moss kept coming out of it?

A. Yes, unless it were kept clean.

Q. And if you had a flume on that hillside you would have to have a closed flume, wouldn't you?

A. You mean for that possible waste water.

Q. Yes. The flume couldn't be laid right down that hillside—an open flume, could it? [65]

A. Are you speaking of a flume to take any possible water from the discharge spout?

Q. Yes. You would have to have a box—

A. You would have to have it covered except at such point where the water would come from the discharge spout into the flume.

(Testimony of John W. Dudley.)

Q. It would have to be a closed affair?

A. Yes, sir.

Q. Kind of a big pipe?

A. It would be a box flume.

Q. A flume built like a pipe?

A. Otherwise it would stop up with sand.

Q. The sand would fall into it, and everything else, if it was open, wouldn't it? A. Yes.

Q. And the water wouldn't overflow because of the steepness of the hill?

A. The water would overflow that box flume just as well—

Q. It wouldn't make much difference whether there was a box flume there or not—the thing would overflow if there was plenty of water come out?

A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. You would have a flume from the end of the spout to take it down to a safe place?

A. Yes, sir.

Q. And the size of that waste flume would be in proportion to the amount of water that might come down there by means of an overflow?

A. That might overflow through the discharge spout; yes, sir.

Q. And this thing would overflow if the screen got sufficiently clogged? A. Yes, sir. [66]

Q. And the screen is of such construction that it would clog a good deal sooner than a flume would?

(Testimony of John W. Dudley.)

A. Yes, sir.

Q. Do you know whether it is possible to shut off this service pipe at any place?

A. It is possible, yes.

Q. And if it is shut off and the water fills up in the penstock, it overflows?

A. I understand that there is a large valve by which it can be closed at any time.

Q. And also something might get into the pipe to shut it off?

A. I doubt that, Mr. Roden,—I don't think with the devices they have that anything could get into that large pipe that would stop it or clog it.

Q. It would not be much of an expense to put a waste flume down the hill there, would it?

A. Not very much.

Q. Just a few dollars? A. Yes, sir.

Mr. HELLENTHAL.—I think that is pretty leading.

Q. Mr. RODEN.—That is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. Now, Mr. Dudley, referring to the matter that Mr. Roden just referred to, where would you lead that flume to?

A. Right into Portal Gulch.

Q. Into Portal Gulch?

A. Yes; that is the natural place for it.

Q. Then the water would run down Portal Gulch, wouldn't it? A. Yes, sir.

Q. Would that be a safe place?

(Testimony of John W. Dudley.)

A. For all I can see, yes.

Q. That would be a safe place? [67]

A. Yes; a natural drainage channel; yes, sir.

Q. If you were to build that flume you would build it from the spout to Portal Gulch?

A. Yes, sir, or near there.

Q. Now, if there was no sand on the ground or anything else, you have testified that the water would naturally run into that gulch, haven't you—if there were no obstruction?

A. If there were no obstruction.

Q. And if the flume should happen to be obstructed by sand or anything else, or filled with sand, it wouldn't carry anything, would it?

A. No, it would have to be cleaned to carry it.

Mr. HELLENTHAL.—That is all.

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 2 o'clock P. M.) [68]

AFTERNOON SESSION.

March 23, 1921, 2 P. M.

Testimony of John Anderson, for Plaintiff.

JOHN ANDERSON, a witness called on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is John Anderson?

(Testimony of John Anderson.)

A. Yes, sir.

Q. Where do you live, Mr. Anderson?

A. Chichagoff.

Q. How long have you been at Chichagoff?

A. 13 months.

Q. What is your business, Mr. Anderson?

A. Carpenter.

Q. You are a carpenter over at Chichagoff?

A. Yes, sir.

Q. Were you in the city of Juneau on the 2d day of January, 1920, at the time of the slide?

A. Yes, sir.

Q. Where were you living at that time?

A. Mrs. Koski's house.

Q. Where is the Koski house located, or where was it located?

A. It was located on Gold Avenue, or whatever you call it.

Q. What avenue did you say?

A. Gold Avenue.

Q. I show you Plaintiff's Exhibit "N," and ask you if you can point out on this picture the Koski house? A. Yes, sir.

Q. Show it to the jury.

A. That is the Koski house right there.

Q. The Koski house is located—

A. The big house.

Q. The big house right above the lamp globe here? A. Yes. [69]

Q. About what time in the morning were you in that house—in the Koski house?

(Testimony of John Anderson.)

A. Oh, I was there all morning, but I was in the front room just a little before the slide—about half an hour or so before the slide.

Q. What did you do about half an hour before the slide?

A. There was three or four of us in the front room—we were sitting around the front room talking, and Pete Koski come in in the front room and called attention to the water that was coming down the sidehill.

Q. Did you get up and look at the water?

A. Yes, sir.

Q. Where was the water coming down?

A. It was coming down off of the hill against the house.

Q. How much water was coming down at that time, Mr. Anderson?

A. There was quite a bit of water was coming down there.

Q. Do you know where this water was coming from—where it originated?

A. It was coming down from the hill.

Q. Straight back up the hill? A. Yes, sir.

Q. How is the hill there?

A. The hill is kind of round—it isn't perfectly flat—that side is pretty close to the house.

Q. It is somewhat in the nature of a hog-back?

A. Yes, sir.

Q. What did you do after you saw this water coming downhill?

A. I went upstairs in my room, put on my boots,

(Testimony of John Anderson.)

and went out from the second story and went up the sidehill.

Q. Was the water still running when you came back there? A. Yes, sir.

Q. Was there anyone else around about the water? A. Pete Koski came after me.

Q. What did you do?

A. I went up the sidehill and I was going to see where the water [70] is coming from, if I can, and turn the water off some way.

Q. How far up the sidehill did you go?

A. Between 30 and 40 feet, I guess.

Q. What did you see then as to where the water was coming from?

A. I couldn't see exactly where the water was coming from, because the sidehill was all covered with water—was running in every direction, and through the brushes, and I couldn't get through any more; and Pete Koski was on the platform behind me at the end of the house, and I think he had a shovel in his hand, and he was calling me back.

Q. You know where the flume of the Alaska Juneau Company is located, or was located at that time? A. Yes, sir.

Q. Between where you were on this sidehill and the flume and the penstock of the Alaska Juneau Company was there anything to obstruct your view, looking uphill?

A. Well, I don't know—there was some little brushes over there but I didn't pay much attention.

(Testimony of John Anderson.)

I didn't have much time—I didn't have enough time to look to see whether the water was coming over the flume or where it was coming from.

Q. Did anything happen while you were on this sidehill?

A. When Pete Koski was calling me back the first time I was still going up the sidehill, and he called me the second time, so I turned myself around and started back, and when I turned around and started back I heard a noise behind me.

Q. Do you know what caused that noise?

A. I looked back and I saw the slide was just breaking loose—the tower was laying close to the hill.

Q. Which tower are you speaking about, Mr. Anderson? A. The steel tower.

Q. Can you show where the steel tower is located on this exhibit? A. Yes, sir.

Q. What is it? Show it to the jury.

A. That is the steel tower there.

Q. Did you notice anything in the way of the wires on the steel [71] tower breaking loose?

A. Yes, sir.

Q. What happened?

A. Well, when the wires broke loose from the tower they splashed together and had quite a bit of fire on the sidehill, at the time when the wires pulled off of the tower.

Q. And you say you saw the ground break loose, —where did you see this ground break loose?

(Testimony of John Anderson.)

A. Just about where you can see on the sidehill over there now.

Q. About how far above the tower?

A. Oh, I should judge about a hundred feet or so, or more, probably—I don't know exactly the distance.

Q. It broke away about a hundred feet above the tower? A. Something like that.

Q. And then came against the tower?

A. Yes, sir.

Q. How did this tower come down—where did it strike?

A. The tower come down and come right on top of the Koski house.

Q. Now, at the time you saw this tower break loose, and at the time the tower broke loose, did you see any water running over this ground that was breaking loose?

A. Not that I ever noticed.

Q. You didn't notice it? A. No, sir.

Q. What did you do?

A. I was laying down in the brush at the time, and all this slide broke loose through there, and I was afraid of them wires, and I was watching all this slide come down, then I got up and started down the hill.

Q. This slide that came down, what was it composed of?

A. Well, must be mud and some water, I guess.

Q. What else,—what was the condition of the material—the ground—the earth?

(Testimony of John Anderson.)

A. The ground was pretty muddy afterwards when the slide come down, when I got through afterwards on the sidehill. [72]

Q. How did you get out of there?

A. Well, I come down the sidehill, and then Mrs. Bach, she come running out from the house, on the porch over there, and she was screaming, and I tried to get over there—I thought she was hurt, too, at the same time, and when I started down, she had a chicken-house fence behind there, and I couldn't get through there—the water was running pretty bad all through that side there, too, so I walked around and jumped over another fence—she has another fence running around the porch, and I jumped over the fence, and went on the porch over there.

Q. Where is the house that Mrs. Bach was in?

A. That is the house there.

Q. That is the house right alongside of the Koski house?

A. Yes, sir; right alongside the Koski house.

Q. That house is still standing?

A. That is still standing in the same place over there.

Q. You can see it from here? A. Yes, sir.

Q. You say there was water coming around the Bach house, too?

A. Yes, sir; the water was running right against the Bach house and on the other side of the Bach house, that I seen at the time when I come down.

Q. What became of the Koski house?

(Testimony of John Anderson.)

A. The Koski house come down the hill.

Q. Were there any other houses come down the hill?

A. John Larson's come down the hill.

Q. Where was John Larson's house situated with reference to the Koski house?

A. It was located below the Koski house.

Q. Is that on the picture?

A. Yes, sir, I guess it is. That is the Larson house there, right in front of Koski's house.

Q. Did any houses on the other side of Koski's come down?

A. No; this little small house came down part ways against the [73] bridge—that is there yet.

Q. These houses came through the bridge?

A. Yes, sir, came through the bridge.

Q. Did it carry any houses away below the bridge?

A. Well, I don't know—there must have been some cabins down there near the Goldstein building; where it come against the Goldstein building, it turned that around kind of corner-wise, down below, on Front Street.

Q. Then you say you went over to the Bach house, went around to where the chicken-yard was, and what did you do?

A. I went on the porch where Mrs. Bach was standing, and I thought she was hurt, but I see she wasn't hurt. I told her, "You better get in the house and get some clothes on and come downtown—get out of the house—chances are something else

(Testimony of John Anderson.)

slide down afterwards," so I left her and came down the sidehill, and the first thing I seen Larson standing on the sidehill in the mud.

Q. Where was Larson standing in the mud?

A. Well, he was standing about 50 feet, or something like that, below the trestle-work—where the trestle-work is in there now.

Q. That is below Gastineau Avenue? A. Yes.

Q. The street there is a trestle?

A. Yes, a trestle.

Q. How deep was he in the mud there?

A. He was around to his knees, I guess, somewhere—I didn't pay much attention to it.

Q. Did you help him?

A. Yes, sir, I helped him to get out of there.

Q. What did you do after that?

A. I come downhill through there and I seen somebody else was taking Mrs. Koski out, and I helped her get out over the stairway over there,—there is another stairway coming down Front Street— [74]

Mr. HELLENTHAL.—I object—that is immaterial, your Honor.

Mr. BODEN.—Yes, I will get away from that.

Q. Now, the water that was coming down behind the Koski house, how much water was coming down, about?

A. It was coming down quite a bit of water—the water was scattered all over that side of it.

Q. How long had this water been running that you know of before the slide?

(Testimony of John Anderson.)

A. What I know is maybe half an hour—something like that—or 20 minutes,—something like that.

Q. Did you see any water running down the gulch just this side of the Koski house, or over in there? A. No, I didn't notice any in that.

Q. Do you know how long the water continued to run?

A. No, I haven't any idea.

Q. Now, describe the location of the Koski house—that is, the construction of it, Mr. Anderson,—how big a house was it, about?

A. Well, the house was, I guess, about 40 feet long.

Q. And about how wide?

A. Between 20 and 22 feet, I should judge.

Q. And how was the foundation put in there?

A. Well, the foundation was kind of levelled off from the bank—that end to the south end of the bank, there was cut in quite a bit, on one corner.

Q. That would be the up hill and down channel corner that you refer to?

A. Yes, towards the Bach house.

Q. About how much was that cut in there?

A. There was a little—I don't know—between 3 and 4 feet high, and it kind of sloped over there a little bit, just in the corner where the stairs come down.

Q. And then you say this cut was about 3 or 4 feet high, and it was levelled off a little—sloped off a little? A. Yes, sir. [75]

(Testimony of John Anderson.)

Q. To the hill—took its natural course?

A. Yes, sir.

Q. How was the end this way, uphill?

A. This way, on this side, right up to the corner of the house there wasn't any cut that I can remember. It come kind of down and sloped more to the sidewalk that was over there, built right up to the sidehill, and the natural bank come up from the corner.

Q. About how long was this cut that you speak about?

A. Oh, it was about 12 or 14 feet, something like that.

Q. That would be 12 or 14 feet from the downstream uphill corner down this way?

A. Yes, sir; there was the biggest cut in that corner over there.

Q. And the highest cut in this corner, to your best estimate, was 12 or 14 feet long, and it came to nothing down at this corner?

A. Something like that; yes.

Q. And how was it on the front side?

A. The front side was built on posts.

Q. Standing up on posts? A. Yes, sir.

Q. Was there a sidewalk back of the house?

A. Yes, there was a sidewalk in the front, sidewalk on the end, and sidewalk on another side—both sides of the house would be a sidewalk.

Q. Let us get it clear—was there a sidewalk on the hillside? A. Yes, sir.

Q. All right—how wide was that sidewalk?

(Testimony of John Anderson.)

A. About 4 feet.

Q. What excavation, if any, did it require to put in this sidewalk,—was any digging done there to put that in?

A. I guess there must be some on that upper part, and maybe there was some at the northern end, too—kind of levelled off a little—just enough to get the sidewalk in.

Q. And then there was a sidewalk on the front side of the building, too? [76] A. Yes, sir.

Mr. RODIN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. There was a little wall, Mr. Anderson, at the lower end, behind the house—that is, down-channel, there were some loose rocks had been piled up and made a little wall straight up about 3 feet; is that right?

A. In the front of the house, do you mean?

Q. Behind the house.

A. I don't know—I don't remember that.

Q. Don't you remember you testified that behind the house there was a little wall there?

A. There was a little cut right in the corner of the house.

Q. Right in the corner? A. Yes.

Q. That was made of rocks piled up?

A. I don't remember that.

Q. You don't remember what it was made of?

A. No, sir.

(Testimony of John Anderson.)

Q. Right in the upper corner there was a little wall about 3 feet high?

A. Something like that—between three and four feet high.

Q. Something like that? A. Yes, sir.

Q. And that wall was straight up and down?

A. Yes, sir.

Q. Then there was no wall behind the kitchen door, was there?

A. No—there was kind of a slope—sloped off a little bit—there was no straight cut through there at all.

Q. The wall was only on the side toward the Bach house? A. Yes, sir.

Q. That rock business? [77]

A. Yes, sir; right in the corner.

Q. And that was about how long, would you think—4 or 5 feet?

A. You mean lengthwise of the house?

Q. Yes.

A. What I mean altogether I testified between 12 and 14 feet, something like that, cut down.

Q. You mean the bank, but I am speaking of the wall—that little rock pile where those loose rocks had been piled up.

A. I didn't see no rock pile.

Q. Didn't see any wall at all—anything to hold it up against the bank?

A. I don't know what the bank was held up—I don't know whether there was any rocks. I remember some people were talking there was a solid

(Testimony of John Anderson.)

boulder in over there, but I couldn't tell that.

Q. You merely want to say that the bank stood straight up about 12 or 14 feet?

A. Something like that, yes, sir.

Q. And you don't know whether there was any wall there or not?

A. No, sir, I don't know what was piled in there.

Q. But the bank didn't stand straight up that much except on the Bach house side?

A. On that side; yes, sir.

Q. And it sloped down toward the gulch?

A. Yes, sir.

Q. Where the floor of the gulch was, the house stood on a level with the floor of the gulch?

A. Yes, sir.

Q. And whatever cut was made to make the foundation was in the bank from the gulch toward the Bach house—in that end of the house?

A. In the corner, yes, sir.

Q. After it had gone straight up three or four feet in the bank it sloped gently up the hill; isn't that right? A. A little, yes.

Q. And it sloped back a little ways, and then it struck the [78] level of the hill, where it originally was, isn't that right? A. Yes, sir.

Q. What you mean to say, the bank was 3 or 4 feet straight up on the Bach house corner?

A. Yes, sir.

Q. And then it sloped up to where it reached the natural bank, and was on a slope—wasn't straight up? A. Yes, sir.

(Testimony of John Anderson.)

Q. And it was about 15 to 16 feet before you got to where there was brush and grass on the bank?

A. No, I don't think it was that far—15 or 16 feet.

Q. How many feet would you think?

A. Must have been about 8 feet.

Q. Eight feet from where it was straight up?

A. No, from the platform—from the sidewalk.

Q. I am speaking of the Bach house end now—from the Bach house end to where there was grass and brush it would be about 8 feet, and at the kitchen door it would be about 8 feet up from the sidewalk; isn't that right? A. No, sir.

Q. How much would it be?

A. You mean from the door?

Q. The kitchen door was about the middle of the house? A. Yes.

Q. Now, in front of the kitchen door there the grade was about 8 feet—that is, the raw bank was about 8 feet from the sidewalk to the top, where the grass was? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. And on the other end there was no bank at all because that other gulch came down?

A. That is right.

Q. That is right, isn't it?

A. Yes, sir. [79]

Q. And on the Bach house side the bank would be about 8 feet from that little wall—it would be about 8 feet from there to where the grass was?

A. Yes, sir.

(Testimony of John Anderson.)

Q. Just to refresh your memory on the matter of time, Mr. Anderson—I call your attention to this, not to impeach you, but just to refresh your memory. You testified on the former hearing, didn't you, on this time matter—I don't suppose you remember exactly how much time any of these things took? A. No, sir, I do not.

Q. And it is only a matter of approximation—that is, you make a guess of it, that is all you remember? A. Yes.

Q. Now, on the former hearing you testified about this way: “Q. You were in the front room, I believe you said, just before the slide? A. Yes, sir. Q. And you went out from there to the sidewalk on the back of the house? A. I went in through the kitchen, yes. Q. That was just about 5 minutes before the slide came? A. Yes, something like that—five or more—something like that—around that time. Q. Might have been 10 minutes? A. Yes. Q. Five or ten minutes—a short time like that? A. Just a short time.” That was the situation, wasn't it, Mr. Anderson?

A. Something like that, I guess.

Q. When you speak of the time you merely approximate it? A. Something like that, yes.

Q. And it would take you in the neighborhood of 5 or 10 minutes—

A. 15 minutes—something like that.

Q. From the time you left the front room until the slide happened? A. Yes, sir.

Q. That is right, isn't it? You were in the front

(Testimony of John Anderson.)

room that morning, and you went out behind the house, I believe? A. Yes, sir.

Q. When you came behind the house, I believe you said there was a great deal of water running down over this raw bank? [80] A. Yes, sir.

Q. That exists behind the house. I think you also said that there were a number of rocks that had come down? A. Yes, sir.

Q. The rocks were scattered along on the sidewalk behind the house? A. Yes, sir.

Q. They were rocks about how big would you say, Mr. Anderson?

A. Some about that size, what I seen when I went out—I didn't take much time to look around when I seen the water was coming down.

Q. They were different sizes?

A. Yes, they were different sizes; and some muck was washed off of the bank, from the bank on the sidewalk.

Q. There was some dirt and some muck and some rocks? A. Yes, sir.

Q. And the rocks were small rocks, maybe from 6 to 8 inches in diameter?

A. Something like that.

Q. You saw that, and you went and put your boots on, didn't you? A. Yes, sir.

Q. I suppose you went about as fast as you could under the circumstances?

A. Yes, I went up fast.

Q. And as soon as you had your boots on you went out of the house? A. Yes.

(Testimony of John Anderson.)

Q. You went out of the back door that leads from the second story? A. Yes, sir.

Q. And went out on to the bank. When you got there, I think you said, there was water running all over the bank? A. Yes, sir.

Q. I think you said there was 15 or 16 streams?

A. I couldn't say how many streams.

Q. I didn't mean to hold you to any particular number, Mr. Anderson, but there were a lot of streams?

A. They were running all over that bank. [81]

Q. A great deal of water? A. Yes, sir.

Q. The water was running so deep that in places where there were little holes you stepped in and it would be 16 to 18 inches deep?

A. Yes,—what I testified was it would be 12 inches deep.

Q. Where there was a hole? A. Yes, sir.

Q. But it was generally in streams all over that bank? A. Yes, sir.

Q. And the water was muddy, I think you said, at that time? A. Yes, the water was muddy.

Q. And there was no mud on the ground—you walked through the water? A. Yes, sir.

Q. That ground was not muddy?

A. Of course on the edge of the sidehill there was a little ice some places.

Q. But it was reasonably firm when you stepped on it? A. Yes, sir.

Q. There was no mud in it—the water ran over the top of it, that is right, isn't it?

(Testimony of John Anderson.)

A. Yes, sir.

Q. And it ran behind the Koski house, and behind the Bach house, and everywhere?

A. Yes, sir.

Q. A great quantity of water? A. Yes.

Q. Now, then, while you were going up the hill you heard a noise behind you?

A. Yes—that is the time when I turned around and started down from the hill.

Q. That was the first you knew of the slide, was when you heard the noise? A. Yes, sir. [82]

Q. And you had seen or heard nothing before that noise occurred—that is right, isn't it?

A. Yes, sir.

Q. When you looked back what did you see?

A. I saw the ground was just breaking loose—the tower was leaning down the sidehill.

Q. That is the first you saw of it?

A. That is the time I turned around and looked back.

Q. That was when you turned back?

A. Yes, when I turned and started back—when I heard the noise I stopped and looked back at the noise.

Q. And you saw it was coming over?

A. Yes, sir.

Q. Then you looked up the hill?

A. No, sir, I didn't look any more up the hill.

Q. But you looked up the hill about that same time?

A. Yes, sir; I was looking up the hill when

(Testimony of John Anderson.)

the tower came down—I was watching the wires.

Q. You saw where the ground was cracked up above?

A. No, I didn't see where the ground was cracked, but it was broke loose quite a ways when I saw it.

Q. There was quite a big opening at the top where the slide broke loose at the time you first saw it?

A. The ground was loose already, and the tower was swinging down at the same time.

Q. And, of course, you couldn't tell how big that opening was?

A. No, sir; I couldn't tell.

Q. All you can say there was a big opening when you first saw it? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [83]

Testimony of William M. Garster, for Plaintiff.

WILLIAM M. GARSTER, a witness called on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name?

A. William Mortimer Garster.

Q. What is your business?

A. I am a laborer, I guess.

Q. How long have you been around the town of Juneau, Mr. Garster? A. About eight years.

(Testimony of William M. Garster.)

Q. At the time of the slide, January 2d, 1920, in whose employ were you?

A. Alaska Juneau Gold Mining Company.

Q. What particular employment were you following on the 2d of January?

A. Driving the ore train.

Q. Had you been in that same employment for some time prior to this date? A. I had.

Q. Had you been, and are you acquainted with the flume and track as it came out of the tunnel there on the sidehill? A. Yes.

Q. And are you acquainted with what has been called the penstock in this case? A. I am.

Q. And the chute that we spoke about this morning? A. Yes, sir.

Q. Have you at any time seen any water running out of this spout? A. I have.

Q. When was that, Mr. Garster?

A. Well, I haven't any definite time,—I imagine within that year, anyway. [84]

Q. Could you testify that you have seen water running out of the chute within six months prior to the slide? A. I had.

Q. About how often? A. About twice.

Q. Where was this water coming from?

A. It was coming out of that little spout that came out of the penstock.

Q. Where did the water go to?

A. I don't know—I have no idea—I was just on my way to work and noticed it.

(Testimony of William M. Garster.)

Q. You saw it come out of the spout and fall on the ground, there?

A. It naturally fell on the ground, I suppose,— I never stopped and looked at it.

Mr. RODEN.—That is all.

Mr. HELLENTHAL.—No questions.

(Witness excused.) [85]

Testimony of John Larson, for Plaintiff.

JOHN LARSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth; testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. John Larson.

Q. Where do you live, John?

A. Live in Juneau.

Q. How long have you lived in the town of Juneau? A. About 8 or 9 years.

Q. Where did you live in the town of Juneau on or about the 2d day of January, 1920?

A. I was living right on the sidehill, where the slide was.

Q. Where were you living with reference to the Koski house? A. Right below the Koski house.

Q. Right below the Koski house? A. Yes.

Q. And on the 2d day of January, 1920, about what time did you get up?

A. I got up at 8 o'clock.

(Testimony of John Larson.)

Q. About 8 o'clock,—did you go outside of the house then?

A. No; first I make a fire in my stove,—I had four stoves and I built a fire.

Q. All right, you built a fire in your stoves, and what did you do?

A. Then I went over to Koski's.

Q. You went over to Koski's house,—what was your purpose in going over there?

A. I went and had my breakfast—I was boarding there.

Q. All right. At the time you went over there what did you see in the way of any water around the house?

A. No, I didn't look—well, I look in that little canyon by [86] the front door.

Q. You looked in the little draw that comes this side of the house? A. Yes.

Q. Did you see any water in there?

A. I didn't see much.

Q. Did you see any? A. Yes, a little.

Q. Then you went in the house?

A. I went in the house.

Q. And had your breakfast?

A. And had my breakfast.

Q. About how long did you stay in there?

A. I stayed about 20 minutes. About 10 minutes to ten I came out there.

Q. Where did you go to?

A. I came out from the side—on the kitchen door there.

(Testimony of John Larson.)

Q. Where was the kitchen door?

A. That was on the sidehill there.

Q. Back part of the house? A. Yes.

Q. Towards the sidehill. Did you see anything going on there at that time? A. Yes.

Q. What was it?

A. I saw some water was coming down the hill.

Q. Water was coming down the hill? A. Yes.

Q. About how much water—give us an idea.

A. Oh, there was quite a bit there.

Q. Where was that water coming from?

A. It was coming from up the hill there.

Q. Do you know how far up the hill it came from?

A. No, I couldn't see how far it was,—I was down on the sidewalk and I couldn't see up. [87]

Q. What did you do then?

A. I had to hurry—I went in my own house and looking after my fire.

Q. You went back to your own house, which was standing just below the Koski house. This is your house here? A. Yes.

Q. That was your house—all right. You went to your house, and did anything happen shortly after you got into your house?

A. I went upstairs. I had a big heater upstairs, then I went and closed the draft; then I came down and went down in my wash room; I had another heater down there, so I looked at that; then I went back upstairs again, and I was going to fix up my beds, but there was two or three men was sleeping

(Testimony of John Larson.)

so I thought I wait a little longer, so I came down and I went in my kitchen, and as soon as I got in my kitchen the slide came and took my house.

Q. You went into your kitchen? A. Yes.

Q. How did you get into this kitchen?

A. I opened the door.

Q. Where was the entrance to the kitchen?

A. That was on the south end of the building.

Q. And after you got into the kitchen the slide came down? A. The slide came down.

Q. Then what happened to you?

A. I went down the hill there.

Q. You went down with the house?

A. About 50 feet below the trestle.

Q. When you speak about the trestle you mean Gastineau Avenue? A. Yes.

Q. Standing on piles through there? A. Yes.

Q. All right,—you went through there, inside of the building? A. Yes. [88]

Q. Then you landed down—

A. I landed down on the floor—on the kitchen floor.

Q. Was any water coming through your house then? A. Yes, there was lots of water and mud.

Q. And you crawled out of there finally?

A. Yes; then a young man come and helped me up there.

Q. Now, about how much time elapsed, say, from the time that you saw the water back of the Koski house until the slide came—about?

A. About 25 minutes.

(Testimony of John Larson.)

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. When you had breakfast at the Koski house and saw the water the first time was about half-past nine, wasn't it? A. About 10 minutes to ten.

Q. Just a little before 10 o'clock?

A. Yes, just a little before ten.

Q. And the slide happened a little after 11 o'clock, wasn't it—a quarter after eleven?

A. About a quarter after eleven.

Q. That would be about an hour and 25 minutes, then, from the time you saw the first water until the slide?

A. An hour and 25 minutes, yes.

Q. How much water did you see coming over the bank there at that time, John,—very much?

A. Oh, quite a bit there.

Q. It was running all over that bank was it?

A. Yes.

Q. The whole bank where it had been cut in—the whole bank was covered more or less with water?

A. I didn't have much time to look,—I was kind of hurrying to get in my own house there. [89]

Q. That is your best recollection of it now,—that is the way it seems to you now, I mean?

A. Yes.

Q. That the whole cut there behind the house was water—water coming all over—that is right, isn't it?

(Testimony of John Larson.)

A. Well, I couldn't say water coming all over it, but coming close to where that slide was.

Q. And ran down on the sidewalk? A. Yes.

Q. And your recollection of it is about 10 minutes to ten?

A. That was the time I came out from Koski's house there.

Q. That is the time you saw it? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Oscar Harri, for Plaintiff.

OSCAR HARRI, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is Oscar Harri? A. Yes, sir.

Q. And you live in the town of Juneau?

A. I do.

Q. What is your business?

A. I am a sheet metal worker at C. W. Young Company.

Q. Were you in the employ of the C. W. Young Company on the 2d day of January, 1920?

A. Yes, sir.

Q. Now, that is the morning of the slide,—the day on which the slide happened? A. Yes. [90]

Q. That morning was your attention called to any water coming down the sidehill?

(Testimony of Oscar Harri.)

Mr. HELLENTHAL.—I object to this witness testifying—it is hearsay. In the previous trial that was admitted under a misapprehension. This witness can testify to what he saw, but not to what his attention was called to.

The COURT.—I think he may answer that question,—was his attention called to anything?

Mr. HELLENTHAL.—The trouble is that he did not go to see anything—that is what he testified to before.

The COURT.—I do not know whether he did or not.

Mr. HELLENTHAL.—That is his previous testimony,—I am judging by what he testified to before.

The COURT.—You know what that means, was your attention called? Did you see any water coming down the hill, that is what that means,—did you see any water coming down the hill? Do you understand the question?

The WITNESS.—I do, yes.

The COURT.—You may answer,—did you see any water, and if so, when and where?

A. I didn't see it the time my attention was called the first time—I didn't look.

Mr. HELLENTHAL.—I move the answer be stricken. The question, was your attention called, is hearsay.

The COURT.—I do not know whether he is going to pursue it any more or not. If he does you can object.

Q. That morning, Mr. Harri, did you see any

(Testimony of Oscar Harri.)

water coming down the sidehill back of the Koski house there?

A. I did, after the slide.

Q. How long after the slide?

A. Oh, it must have been two minutes after the slide,—the time the fire-truck got down there,—that is the first time—

Q. You saw the fire-truck pass the C. W. Young place, did you?

A. I didn't see it—I heard it. [91]

Q. Then what did you do?

A. My attention was called again about the slide—Mr. Fisher called my attention to it.

Q. And you stepped to the window then?

A. Yes, stepped to the window and looked.

Q. What did you see?

A. I seen the water running down, and I seen the slide had come down.

Q. Where did you see this water coming from?

A. Coming from the penstock that was up there.

Q. How much water did you see coming from that penstock?

A. It looked to me quite a stream—I couldn't tell exactly. The last time I said it was two or three feet wide—of course it spread some.

Q. Where did this water hit or come to with reference to where the slide happened?

A. Pretty near right straight on top, it looked to me, looking from a distance as I did.

Q. Now, who else saw that at that time, Mr. Harri?

A. Mr. Hanson—Ole Hanson.

(Testimony of Oscar Harri.)

Q. Anybody else? A. Mr. Fisher.

Q. Where is Mr. Fisher now?

A. I don't know—back in the east, I guess.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. When you looked out, Mr. Harri, you saw quite a stream of water coming out of that spout, after the fire-truck had gone down towards the slide? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. That is the first time you looked out of the window? [92] A. Yes, sir.

Q. And that stream of water ran down the hill in the direction of where the slide happened?

A. The way it looked to me from looking from the shop.

Q. You couldn't follow the water on the hillside by looking, with your eye?

A. Not the distance I was.

Q. You only judge it was in that direction because that was the downhill way—the natural way for it to flow? A. That is right.

Q. You could not see it from where you were?

A. I could see it for a distance.

Q. You could see it coming from the penstock, but after it got to the brush you couldn't tell where it went to?

A. It started to run through the brushes.

Q. And then you couldn't tell where it was?

(Testimony of Oscar Harri.)

A. I could see it running over to where the slide is.

Q. When you testified before didn't you testify that you could not see where the water ran to from where you were?

A. I don't think I did—I might.

Q. Didn't you testify there was brush on the hill and you couldn't see it except right on top—except from the penstock?

A. I don't believe that question was asked me, about the brush.

Q. Let's go into it now. The water came from that spout and ran down the hillside? A. It did.

Q. And you could see it for a short distance, following the spout? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. And after that it ran into the brush and you couldn't tell where it went—that is right, isn't it?

A. Couldn't see it in the brush, no; where the water come through the brush again I could see it again. [93]

Q. Where did you see it then?

A. It ran where the slide was.

Q. Did you see the water where the slide had been? A. I did.

Q. Did you so testify before?

A. It wasn't asked.

Q. We will see about it. A. I don't remember.

Q. Didn't you testify before the water ran as far

(Testimony of Oscar Harri.)

as the stump and you lost sight of it when it got to that stump?

A. I don't believe I did say anything about a stump—I cannot remember.

Q. The time the fire-bell rang you were in the boiler, weren't you A. No, sir.

Q. You didn't hear the fire-bell, did you?

A. I didn't hear the fire-bell, but I heard the fire-whistle.

Q. You heard the truck as it went up?

A. Yes, sir.

Q. That is the first you heard of it, and how long after the truck went by did you look out the window?

A. Right then and there—at the same time.

Q. Were you standing right at the window?

A. Pretty close.

Q. How close?

A. There was only a work-bench between me and the window.

Q. What were you doing?

A. I was making a gas-tank.

Q. You didn't have the gas-tank on the work-bench, did you? A. No—right alongside of it.

Q. How near the top of where the slide broke loose did you see the water—could you see it?

A. On top of the slide.

Q. Yes, you saw where the slide broke loose, didn't you? [94] A. I don't catch you.

Q. I say you saw where the slide broke loose on top there—could you see that? A. Yes.

(Testimony of Oscar Harri.)

Q. How far above that could you see the water?

A. Not very far—the brush was pretty close there.

Q. The water above where the slide broke loose was taking a curve there down that ditch or trail, wasn't it. A. I don't know—I couldn't see that.

Q. But it would be 15 or 20 or 25 feet above where the slide broke loose where you could see the water at its lowermost point—is that right?

A. I couldn't give any distance—it is too far.

Q. I don't mean the exact distance, but about that.

A. It wasn't very far where the brushes was from it.

Q. It was all the way from 15 to 25 or 50 feet—maybe not so far—from the top of the slide where it broke loose to the lowermost place you could see the water? A. It was a little distance.

Q. And the water didn't come quite to the slide—that is, there was a distance of from 15 to 50 feet—

A. The water got to the slide, but before the brush—

Q. That is when you could see it, I am talking about. A. Yes.

Q. You couldn't see the water between the top of the slide and the place where you saw the water—say, maybe, 15 and maybe 50 feet—is that right?

A. Yes; I couldn't see the water in the brushes.

Q. Answer my question—that is right, isn't it?

A. Yes.

(Testimony of Oscar Harri.)

Q. I know you couldn't see it in the brush—that is true? A. Yes.

Q. There was a distance of maybe 15 to 25, 30 or 50 feet, maybe, from the top where the slide broke loose to the place you [95] saw the water at the lowest point, is that right?

A. There was a distance from where the slide broke loose to where the brushes are.

Q. I am asking you, not where the brush are, Mr. Harri—but there was a distance of from 15 to 25, or 30 or maybe 50, feet between the top of the slide and the place where you saw the water at its lowest point on the hillside—that is right, isn't it?

A. I don't know the distance—there was a little distance between them.

Q. There was some distance? A. Yes.

Q. I didn't ask you to say just what the distance was—there was a distance of from 15 to 50 feet—somewhere in there? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. Now, you were a witness when this Koski case was tried, weren't you—the case of Koski against the Alaska Juneau Company? A. I was.

Q. You were sworn and testified in that case, weren't you? A. Yes.

Q. Now, listen to me. I will ask you if you did not testify in that case as follows: "You saw that water running down the hillside? A. Yes, sir. Q. Did you see it running over that trail—following that trail down? A. I don't remember, no, sir.

Q. You don't remember where it went to? A. I

(Testimony of Oscar Harri.)

could see it was coming down that spout, or something. Q. That is all you could see? A. That was all, yes. Q. You don't know where the water ran? A. No; I was busy working and didn't pay any attention." Did you so testify?

A. I believe I did, yes.

Q. How is that? A. I think I did. [96]

Q. That was true, wasn't it? A. Sure.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [97]

Testimony of Ole Hanson, for Plaintiff.

OLE HANSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is Ole Hanson? A. Yes, sir.

Q. Where do you live? A. In Juneau.

Q. What is your business?

A. Blacksmithing and carpenter.

Q. How long have you lived in the town of Juneau?

A. I have been here three years—two years and eight months.

Q. On the 2d of January, 1920, were you in the town of Juneau? A. Yes, sir.

Q. Where were you?

A. In the shop in C. W. Young's.

(Testimony of Ole Hanson.)

Q. You were working in the shop of C. W. Young and Company? A. Yes, sir.

Q. Where is the shop located?

A. Down here on Ferry Way.

Q. Is that the same shop that Oscar Harri was working in? A. Yes, sir.

Q. Was Oscar working there on the 2d day of January, in the morning? A. Yes, sir.

Q. On the second day of January, in the morning, do you remember about when the slide happened?

A. Yes, sir.

Q. Where were you when the slide happened?

A. I was inside of a gas-tank.

Q. You were inside of a gas-tank? A. Yes.

Q. In the shop? A. Yes. [98]

Q. You were fixing a gas-tank inside? A. Yes.

Q. That morning did you have occasion to go to the window of the shop? A. Yes, sir.

Q. For what purpose?

A. I went there to open the window because it was too warm in there.

Q. It was too warm in the shop. Did you then look at the side hill? A. Yes, sir.

Q. Did you see any water on the side hill above the Koski house? A. Yes, sir.

Q. Where was the water coming from at that time?

A. It was coming from the end of the shack standing up there on the hill.

Q. When you say the shack what shack do you mean?

(Testimony of Ole Hanson.)

A. I don't know what you call it—the dry house, I think you call it, coming out of the flume—the water was coming out of there.

Q. It was at the end of the flume? A. Yes, sir.

Q. Was it what we have called here the penstock?

A. Yes, it was the penstock.

Q. How much water was coming out of there?

A. It was in my judgment between two and three feet wide.

Q. A stream two or three feet wide—of course you cannot tell how deep that water was?

A. No.

Q. What time of the morning was it that you saw this water coming out at the time you opened the window? A. About 5 minutes after ten.

Q. How do you know it was that time?

A. I was downstairs after rivets—we were starting to rivet a tank—and I looked at the clock in the office. [99]

Q. And you were downstairs after rivets?

A. Yes.

Q. And you took a look at the clock? A. Yes.

Q. And you went up and looked out of the window and saw the water coming down the hill?

A. Yes.

Q. Whereabouts was it hitting?

A. It was hitting down here through the brush—I see it on top of where the slide started, and on top of that stump that is standing there yet.

Q. I show you Plaintiff's Exhibit "N" and ask you to point out the stump you are speaking about.

(Testimony of Ole Hanson.)

A. That stump right here.

Q. Show that to the jury.

A. Coming right alongside of that stump, on the high-hand side here.

Q. Show them the place where the water was coming from.

A. Coming out here from the end of the shack and coming down the hill here.

Q. And you saw that about 10 o'clock?

A. Yes.

Q. What did you do after you opened the window and saw that stream of water?

A. I told Oscar Harri that was an awful big stream of water coming down the hill.

Q. Don't tell what you said. Did you go back to your work? A. Yes, sir.

Q. Did you again look out of that window that morning?

A. No, not until after the fire-bell rang and Mr. Fisher came up.

Q. And then you looked out of the window again?

A. Yes.

Q. You heard the fire-bell ring?

A. No, I didn't hear the fire-bell ring. [100]

Q. What did you hear?

A. Mr. Fisher came up and asked where the fire was, and he looked out of the window, and Oscar Harri came over to the window, and I looked out, too, and we saw the slide and the houses and the whole thing were down the hill.

Q. Did you hear the fire-truck go by?

(Testimony of Ole Hanson.)

A. Yes, the fire-truck came and stopped there.

Q. Stopped where? A. On Front Street.

Q. Stopped on Front Street below the slide?

A. Yes.

Q. When you looked out of the window at that time did you see any water?

A. Yes, the water was still coming then.

Q. Where was that water coming from?

A. From the same place, the end of the shack, coming down.

Q. Did you see this water running over the slide area then?

A. Yes, it was running over the slide then—the slide was going down.

Q. How big was this volume of water compared to the volume you had seen before?

A. It was the same thing—it was a little bigger if it was anything.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That was about what time in the morning when you first looked out of the window?

A. Five minutes after ten.

Q. Now, how long did you look out of the window at that time?

A. A couple of minutes, maybe—a minute or two—a couple of minutes—something like that.

Q. And at that time you say you saw water coming from the shack? [101]

(Testimony of Ole Hanson.)

A. Yes, from the end of the shack there.

Q. That little shack? A. Yes.

Q. Did you see any water coming from any place else there?

A. No, I wasn't paying any attention to anything else there.

Q. I didn't ask you whether you were paying attention to anything else—did you see any water coming from any place else except that one place?

A. No, I didn't look at any other place.

Q. The only water you cared about was the water that came from the penstock?

A. Yes—that was all the water I looked at.

Q. You didn't see water coming from the roof of the snowshed just near the penstock?

A. No, I didn't pay attention to it.

Q. You didn't see it, did you? A. No.

Q. You only saw one stream of water?

A. Yes.

Q. That is all you saw? A. That is all I saw.

Q. And you looked a couple of minutes?

A. Yes.

Q. And you looked at it through the brush?

A. I looked at it and I could see it some places through the brush—it come down hill there.

Q. You had to look through the brush to see it from where you were?

A. There was open places; you could see the water from the place I looked.

Q. But generally speaking the water you saw, you had to look through the brush to see it?

(Testimony of Ole Hanson.)

A. Yes, sir.

Q. There were a lot of young trees and small brush between you and the place where the water was? A. Yes. [102]

Q. Now, when you say you saw that water on the slide when you looked out the second time, you don't mean to say you traced it all the way down to where the slide was? A. No.

Q. You didn't see the water right above the slide, did you? A. Yes, I saw it right above the slide.

Q. You saw it a little ways above the slide?

A. Yes.

Q. About 15, 20 or 25 feet above the slide was the last place you could see the water, wasn't it?

A. Yes, something like that—maybe a little more.

Q. There was a space between the place where it broke loose and the place you saw the water of about 15, 20 or 25 feet, maybe a little more? A. Yes.

Q. That is the time you looked out the second time? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [103]

Testimony of Ambrose Hyle, for Plaintiff.

AMBROSE HYLE, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name? A. Ambrose Hyle.

(Testimony of Ambrose Hyle.)

Q. What is your business?

A. Driving team for the Juneau Transfer.

Q. Do you live in the town of Juneau, Mr. Hyle?

A. Yes, sir.

Q. How long have you lived here?

A. Twenty-three years.

Q. Were you here on the 2d day of January, 1920, at the time of the slide? A. Yes, sir.

Q. Where were you at the time of the slide, Mr. Hyle?

A. At the time of the slide I was at the office.

Q. You were at the office of the Juneau Transfer Company? A. Yes.

Q. Prior to this time—that is, prior to the slide were you down on the Pacific Coast dock at any time? A. Yes, sir; about 10 o'clock.

Q. About 10 o'clock that morning?

A. Yes, sir.

Q. What were you doing down there, Mr. Hyle?

A. Loading freight.

Q. Did you have occasion at that time, or about that time, to look up on the sidehill in the direction of the Alaska Juneau penstock? A. Yes, sir.

Q. Did you see any water up there anywhere at that time?

A. Yes, sir; there was quite a head running there.

Q. Where was this water coming from, Mr. Hyle?

[104]

A. The spillway at the end of the—

Q. The spillway at the end of the penstock there?

A. Yes.

(Testimony of Ambrose Hyle.)

Q. Can you give us an estimate as to how much water you saw coming out of the spillway?

A. There was quite a head—two or three foot wide—I don't know how deep it was.

Q. Where was this water going to—where was it running to?

A. I just took notice of it dropping there on the ground—I did not see where it went to.

Q. You paid no further attention to it after that?

A. No.

Q. Did you go down to the slide area after it happened?

A. Yes, sir; I drove down after it happened.

Q. How long after the slide happened was it that you went down there?

A. Oh, right away—that is, after the fire-bell rang.

Q. Can you give us any idea as to about how long?

A. It would take me maybe five minutes.

Q. You went down there as fast as you could from the transfer office? A. Yes, sir.

Q. That is Bill Casey's transfer office?

A. Yes, sir, I went down with the team.

Q. When you got down there did you see any water coming down?

A. We were on the truck—I wasn't looking up the hill.

Q. I mean did you see any water coming down over the slide area at that time?

A. They hollered to me there was another slide

(Testimony of Ambrose Hyle.)

coming and for me to get out, so I turned my team around and come back up.

Q. You paid no attention to anything up there at that time? A. No, not at that time.

Q. And you saw this water coming out of the spillway or penstock about how long before the slide?

A. It was somewhere about 10 o'clock—I couldn't tell exact. [105]

Q. And that was practically an hour or an hour and a half before the slide happened?

A. Something like an hour or so. I delivered my load and got back there to the office and was there a few minutes when the fire-bell rang.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. I think you testified before that you did not see any water coming over the snowsheds that morning?

A. I didn't take notice of any,—I saw water in the gullies all along the hill.

Q. But you saw no water coming over the snowshed in the neighborhood of the penstock?

A. I didn't take notice of any.

Q. I mean you don't remember seeing it?

A. I don't remember seeing it.

Q. And you only saw one stream of water coming from that level of the flume line?

A. That end of the chute—there was quite a big stream.

(Testimony of Ambrose Hyle.)

Q. Listen—I am asking you if you saw more than one stream coming from that same level,—you only saw one stream? A. One from that chute end.

Q. You only saw one, is that right?

A. I saw more water coming down the mountain.

Q. I know, down in the gulches you saw it?

A. Yes, sir.

Q. It was a rainy day and the water was in the gulches; that is right, isn't it? A. Yes.

Q. But you saw only one stream coming from the company's flume line, I mean, at that level?

A. From the chute—there was one stream coming from there. [106]

Q. You didn't see any stream coming over the snowshed?

A. I didn't take notice whether there was or not.

Q. Did you see one, or not?

A. No, I didn't take notice.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) The stream you did see came from the chute?

A. The chute at the end of the bulkhead there—the penstock.

Mr. RODEN.—That is all.

(Witness excused.) [107]

Testimony of William J. Maynard, for Plaintiff.

WILLIAM J. MAYNARD, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of William J. Maynard.)

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name?

A. William J. Maynard.

Q. What is your business? A. Teamster.

Q. Whose employ are you in at the present time?

A. Femmer & Ritter.

Q. How long have you been in their employ?

A. *Growing* on three years.

Q. Were you in the town of Juneau on the 2d day of January, 1920? A. I was.

Q. Were you engaged in the teaming business then? A. I was.

Q. What did you do on the morning of the 2d?

A. Why, I delivered different orders around town,—not very many that morning.

Q. Were you on the Femmer & Ritter dock at any time that morning? A. I was.

Q. What time were you down there?

A. I was down there the forenoon—practically all forenoon, as near as I can remember. I think I only made three trips out. The last trip I made out was to the Case rooming-house.

Q. That morning, do you remember about when the slide happened? A. I do.

Q. Where were you when the slide occurred?

A. When the slide occurred I was coming off the Femmer & Ritter dock, just turning the corner at Tom Knudsen's place, just hitting out on to the road, when the slide occurred.

Q. Prior to this had you had occasion to look up

(Testimony of William J. Maynard.)

on the hillside in the vicinity of the Alaska Juneau penstock? [108] A. I did that morning.

Q. What did you see there?

A. I saw water coming down.

Q. Where was that water coming from?

A. From the top of the hill—I should judge about where the flume is.

Q. Where did the water go to?

A. It came downhill.

Q. Could you see where this water originated?

A. I could see that there was a stream of water coming down there—it must have come from some place, from a flume or somewhere. It would be impossible to my notion for a stream of water like that—

Mr. HELLENTHAL.—Never mind—you testify to what you saw—not what you think about it.

A. I seen a big stream of water coming down the hill.

Q. But you couldn't tell exactly where that stream was coming from?

A. No, sir, not exactly—I could see where it started from.

Q. Where did it start from?

A. It started from what I call the flume.

Q. Whose flume?

A. The Alaska Juneau Company's.

Q. How big was this stream of water?

A. To my estimation the stream of water, when I first saw it, was a very small stream, about half-

(Testimony of William J. Maynard.)

past nine—it was larger about 10 o'clock—it was quite a bit larger.

Q. After you saw this stream of water you attended to your business?

A. I called another man's attention to it.

Q. It is not admissible, what you told the other man—we will not talk about that. At the time this slide occurred you say you were just driving off the dock and turning the corner at Tom Knudsen's place? A. Yes, sir.

Q. Could you see the slide area from there? [109]

A. Yes, sir.

Q. Could you see any water coming from the slide area—over the slide area at that time?

A. Not at that time, but when I got to C. W. Young's I could see the water coming down.

Q. Where was this water coming down?

A. It was coming down about the middle of where the slide occurred.

Q. Where was this water with reference to where you had seen the water an hour before?

A. Some of it was coming to the brow of the hill, and some of it was coming down to the right of the slide, coming down the gully.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Some of the water was running down into the gulch, and some was running over the top?

A. Yes, sir.

(Testimony of William J. Maynard.)

Q. And you first saw the slide,—you heard the slide, I suppose, didn't you? A. No, sir.

Q. Then the slide was over when you first looked at it? A. No, sir.

Q. What drew your attention to it, that is what I am trying to get at? A. I see it slide.

Q. The houses were coming down when you looked over there?

A. The houses had gone,—I could just see the back part of the slide—the houses had already settled; there was some rocks and some mud coming down. I only just see the tail-end of the slide because I just come around the corner of the building.

Q. At that time you could not see any water coming over the top? [110] A. Not just then.

Q. Then you drove around and drove towards the slide?

A. I drove towards the slide as fast as I could drive.

Q. When you got downtown—where were you when you looked at it again?

A. At C. W. Young's, at the corner.

Q. And then you saw the water coming over the top? A. I saw the water coming over the top.

Q. And the water you saw in the morning, you remember there was a stream of water coming from the Alaska Juneau flume, but you don't know what point in the flume? .

A. Yes, sir, I do; I know the point where it came from.

(Testimony of William J. Maynard.)

Q. It came from the Alaska Juneau flume, at that level? A. Yes, sir.

Q. You wouldn't say within 50 or 60 feet where it was coming from? A. Yes, sir, I would.

Q. How many feet was it from the portal of the tunnel?

A. From the portal of the tunnel—you mean where the tunnel comes out of the ground?

Q. Yes.

A. I should judge in the neighborhood, not over 15 feet, to the best of my ability.

Q. About 15 feet from where the old portal, the portal on the hillside there comes out of the ground—about 15 feet from there is where you saw that water running? A. I should judge.

Q. And you only saw one stream of water?

A. Only saw one stream of water.

Q. And no more? A. And no more.

Mr. HELLENTHAL.—That is all. [111]

Redirect Examination.

(By Mr. RODEN.)

Q. This stream of water, was there a little building it seemed to come from?

A. There seemed to be a little building or a box of some kind there.

Q. I show you Plaintiff's Exhibit "N," and ask you to point out where this water was coming from.

A. Right about here.

Q. Show it to the jury. A. Right about there.

Mr. RODEN.—That is all.

(Testimony of H. P. Crowther.)

(Witness excused.) [112]

Mr. RODEN.—It has been agreed that the testimony of Mr. Crowther given at the last trial may be read into the record.

Mr. HELLENTHAL.—That is agreeable, your Honor.

Mr. RODEN.—It is understood, then, that if Mr. Crowther were here to testify he would testify as follows.

Mr. HELLENTHAL.—The whole thing goes in the record, objections and all. There is no use of reading the objections now—the Court has already passed on them in the other case.

Mr. RODEN.—Can it not be agreed that the record goes in the same as it appears in the transcript here?

Mr. HELLENTHAL.—Yes,—that is, the entire transcript?

Mr. RODEN.—Yes.

(Whereupon the testimony of H. P. Crowther was read in evidence as follows:) [113]

Testimony of H. P. Crowther, for Plaintiff.

H. P. CROWTHER, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. State your name. A. H. P. Crowther.

Q. What is your occupation, Mr. Crowther?

(Testimony of H. P. Crowther.)

A. Civil engineer.

Q. How long have you followed that profession?

A. Practically for the last 18 years—part of the time at other work, though, than civil engineering.

Q. Where were you educated?

A. In Liverpool University, England.

Q. Does it come within the scope of your education as an engineer to study hydraulics and questions connected therewith? A. Yes, sir.

Q. How long have you been in Alaska?

A. Since August, 1905.

Q. And most of that time in the neighborhood of Juneau?

A. The first seven years of that time I worked for the Perseverance Company exclusively; since that time I have been all over Alaska.

Q. During your professional career, aside from your theoretical studies, have you had any opportunity to become acquainted with ditches and flumes and hydraulic works? A. Yes, sir.

Q. Will you give the Court and jury a general idea of what practical experience you have had along that line, including what you have observed from others?

A. The first work that I ever did in connection with hydraulic engineering was in Montana in 1903. At that time I was working for one of the power companies there. I did a lot of surveying of the ditch lines and flume lines, computations on [114] pipe-lines, and so on. After I came to Alaska I designed and superintended the construction of some

(Testimony of H. P. Crowther.)

of the flume work for the Gastineau Company, or the Perseverance Company, as it then was; and at intervals since then I have worked on the same class of work whenever a demand has been made for my services in that connection,—particularly in connection with water power permits for the Forest Service—that is, the United States Forest Service, in compliance with the requirements and the regulations of that service.

Q. You are acquainted with what is known as penstocks, their uses and purposes, in connection with the handling of water? A. Yes, sir.

Q. What are the purposes of penstocks?

A. Well, the term penstock as it has been used in this case is a particular kind of penstock. The engineering term “penstock” means other things besides this small reservoir which we have got in this case.

Q. Confine it to penstocks of the character connected with this work.

A. The object of a penstock at the terminus of a flume is to insure regularity of flow of water into the service pipe which drains the penstock. It is simply an equalizing reservoir to prevent fluctuations of water in the pipe-line taking the water away from the box or reservoir.

Q. A penstock is sort of a temporary impounding of the water before it enters the service pipe?

A. Yes; it is an enlargement of the end of the flume,—it has greater lineal dimensions than the flume, and is generally deeper, the object of giving

(Testimony of H. P. Crowther.)

it the greater depth being to prevent air being taken in through a vortex at the orifice of the pipe, thereby causing a fluctuation of pressure in the pipe.

Q. The aim, then, is to keep more water in the penstock than the service pipe is able to carry away—that is to say, have sort of a reserve in the penstock? [115]

Mr. HELLENTHAL.—Just a minute—do I understand the witness to be testifying as to what the conditions were at this penstock or an ideal penstock? Which is it he has in mind?

Mr. RUSTGARD.—The question is in regard to the purpose of penstocks of this character and for the purpose here in question.

Mr. HELLENTHAL.—I do not think the witness has testified that he knows what the character of this penstock was.

The COURT.—I understood the witness to testify that the purpose of a penstock is what he has just been describing—to keep the air out of the pipe and secure uniform pressure. I did not understand him to be talking about this penstock particularly.

Mr. RUSTGARD.—Penstocks generally.

Mr. HELLENTHAL.—That is all right—penstocks generally.

A. Yes; it acts as a small reservoir to smooth out momentary fluctuations in the flow.

Q. There has been evidence introduced here to show that the water is being used in a mill here for reducing ore—I will ask you, Mr. Crowther, whether

(Testimony of H. P. Crowther.)

you are acquainted with the general character of that mill? A. I am.

Q. You have been through it several times?

A. I have.

Q. Is it of any importance in that mill to keep a regularity of the pressure? A. It is.

Q. In what way?

A. A considerable part of the water which is used in a metallurgical process such as takes place in this particular mill is dependent entirely on the regularity of the pressure. There are a number of small jets which feed on to the shaking tables. If any change takes place in the pressure of the water supplying those jets the process of concentration on those tables is interfered with. The load of water, and the load of [116] material on the table, and the speed of the shake of the table are the determining factors in its efficiency, and all three of those things must be kept uniform as nearly as possible.

Q. You have heard, I believe, all of the evidence in this case, have you not, Mr. Crowther?

A. Yes, sir.

Q. And you have heard evidence to the effect that water flowed from this penstock through the spout referred to upon the ground and downhill. I wish to have you state whether there was any ready and expedient and practical way of preventing any overflow water from doing any damage on the hillside in the event of an overflow?

Mr. HELLENTHAL.—I object to that,—it is a

(Testimony of H. P. Crowther.)

simple charge of negligence stated in the bill of particulars and does not include the matters contained in counsel's question. The particular charge of negligence is that there was not sufficient service pipe to carry away the water of the penstock.

The COURT.—My recollection is that one of the allegations is that you did not have any spillway.

Mr. HELLENTHAL.—The charge is, first, that the service pipe was not large enough, and not being large enough of course a spillway was necessary in the flume; but there has been no proof yet that the service pipe was not large enough. Until that proof comes, of course there was no necessity for a spillway in the flume—one is dependent upon the other.

Mr. RUSTGARD.—It is an easy matter to dispose of by looking at the bill of particulars. After our allegation in paragraph No. 2, I make the further allegation that they were negligent in not providing a waste flume to carry away any waste water which for any cause whatsoever might overflow the flume or the penstock. Now I call the witness' special attention to the question of whether or not it was negligence to fail to provide a waste flume, and my question is directing his attention [117] to that feature of it, and that is specially alleged as one of the items of negligence, failure to provide a waste flume by which overflowing water would be carried to a safe place where it would not do any damage, no matter for what reason it overflowed.

(Testimony of H. P. Crowther.)

Mr. HELLENTHAL.—Until there is evidence of overflow, as alleged in the bill of particulars, it becomes absolutely immaterial whether there is a waste flume or not. There has been no such evidence—there has been no evidence that water came from the spout, and no evidence that there was an overflow of that penstock. He says the water could not be carried away by the service pipe, but there is no such evidence.

The COURT.—The crux of the matter is whether or not the overflow, no matter from what it was caused, could have been taken care of.

Mr. HELLENTHAL.—Your Honor is right about that, but the point I was reaching was this, that there is no evidence that there was an overflow.

The COURT.—There is some evidence that the water came from the penstock—it is a question for the jury.

Mr. HELLENTHAL.—The evidence does not show that the water that overflowed was in the penstock, much less an overflow from the penstock.

The COURT.—Oh, yes, Mr. Hellenthal; one witness testified to that and you tried to get him to state definitely whether or not the water he saw was not snow water coming over the snowshed. I think there is enough evidence to lay a foundation for the question.

(Whereupon the question was read to the witness as follows:)

(Testimony of H. P. Crowther.)

Q. You have heard evidence to the effect that water flowed from this penstock through the spout referred to upon the ground and down hill. I wish you would state whether there was any ready and expedient and practical way of preventing any overflow water from doing any damage on the hillside in the event of an overflow? [118]

A. Yes, there was.

Q. What would that be?

Mr. HELLENTHAL.—I object to that as immaterial, all the way through.

A. Provide a wooden box or pipe of some description to carry that water down the hillside to a point below where it might cause any damage.

Q. To have a closed box or pipe to convey the water to a safe place? A. Yes.

Q. An ordinary sewer box would do for that, wouldn't it? A. Perfectly well.

Q. Would that be any great engineering feat to have any such thing?

A. It would not; and the dimensions of that box would be considerably smaller than the flume because the carrying capacity would be considerable greater. Any small box on a steep grade would be considerably larger than a large flume on a flat grade.

Q. State whether or not ordinary careful engineering of handling this water would require the installation of such a box?

A. In my opinion it would.

Mr. HELLENTHAL.—I object to that because

(Testimony of H. P. Crowther.)

the facts with reference to the conditions of this penstock are not even before the Court, or before the witness to answer a hypothetical question.

The COURT.—Objection overruled.

Q. Let us ask you, Mr. Crowther, whether or not you think that just a little care and caution on the part of the men in charge of this water would have suggested the installation of such a box?

Mr. HELLENTHAL.—Your Honor, I object to that.

The COURT.—I think that is argumentative, Mr. Rustgard.

Q. Let me ask you, Mr. Crowther, whether or not you think that the failure to make such provision for an overflow, for one reason or another, was gross negligence?

Mr. HELLENTHAL.—I object to that—that is a question of law. [119]

The COURT.—Do you want to win your case and then lose it in the upper court, by asking what in his opinion is negligence?

Mr. RUSTGARD.—I asked him whether or not in his opinion he considered that gross negligence.

The COURT.—A witness, expert or not expert, cannot testify to what is negligence or what is not negligence. He can testify to what is the proper way to do a thing and what results follow, and what a thing may indicate to him, but he cannot testify to what is negligence. It is for the jury to say what is negligence and what is not negligence.

Q. Mr. Crowther, you are acquainted with the

(Testimony of H. P. Crowther.)

hillside where this slide took place? A. I am.

Q. And you are acquainted with the character of the soil and the grade of the slope?

A. In a general way. I have never made any specific examination of the slide at that particular point beyond a casual observation.

Q. You know in a general way the composition of the soil there—the ground?

A. Yes; just as I do the locality of ground when I would be traveling over it.

Q. You have heard the testimony of the witnesses as to the character of the soil and the ground, whatever testimony has been introduced on that point? A. I have.

Q. State whether or not under certain conditions water deposited upon the ground, of the character and slope here in question, a slide would be caused?

Mr. HELLENTHAL.—We object to that. That is a question for a geologist and not a civil engineer. Furthermore, it does not define the conditions.

The COURT.—The question simply means whether or not water deposited on there ever would, under any circumstances, cause a slide—is that what you mean? [120]

Mr. RUSTGARD.—That is practically it, your Honor.

The COURT.—Very well,—if he can answer that question he may.

The WITNESS.—I would say yes.

Q. What are the conditions under which water

(Testimony of H. P. Crowther.)

would cause a slide of ground of the character stated,—as the ground here in question?

Mr. HELLENTHAL.—I object to that because the witness is not qualified to answer,—is not qualified as a geologist.

The COURT.—Objection overruled.

Mr. HELLENTHAL.—Exception.

A. If a sufficient quantity of water were added to the soil, to the point where the soil became saturated or supersaturated, it naturally would tend to slide—in other words, the material would seek a flatter angle of repose on account of the admixture of water making the soil more fluid—finally get the soil into a mushy condition if you had sufficient water.

Q. And it is that process of the ground in seeking a flatter angle of repose that would cause the slide? A. Yes.

Q. Now, let me ask you again. If the ground is saturated with water will or will not the weight of additional water have any tendency either to produce or avert a slide?

Mr. HELLENTHAL.—I object to that because the witness is not qualified to answer. This is a matter of expert testimony upon which the witness is not qualified to speak.

The COURT.—I think you ought to qualify him, Mr. Rustgard, a little more—what he knows about slides—what he knows about slopes and angles of repose—whether or not those things come within the scope of his experience.

(Testimony of H. P. Crowther.)

Mr. RUSTGARD.—I will do that, your Honor, but I want to make a very frank statement to the Court before I do. I think all these things are matters of common sense, and when I offer expert testimony it is simply in the superabundance of precaution. [121]

The COURT.—If you think they are matters of common sense and common observation, then expert testimony is not admissible.

Mr. RUSTGARD.—We will offer expert testimony, nevertheless, your Honor.

Q. How many years did you say you had lived in this neighborhood, Mr. Crowther?

A. I made my home in Juneau from 1905 to 1918.

Q. Well, now, during the time you have lived in this neighborhood have you had occasion to observe the action of water upon ground of this character and on slopes of this character?

A. Yes; particularly in connection with road work,—on the Basin road, where I had charge of the repairs on that road at different times extending over months at a time.

Q. Well, let me ask you, too, the study of and observation of the effect of water upon slides, with reference to the conditions under which slides may be produced or would be produced, is that or is it not a part of the study of your profession as an engineer and surveyor?

A. Yes; it is a thing that you come up against

(Testimony of H. P. Crowther.)

every day in practical experience in my line of business.

Mr. RUSTGARD.—Now, then, I submit the same question.

Q. If the ground is saturated with water will or will not the weight of additional water have any tendency either to produce or avert a slide?

Mr. HELLENTHAL.—I make the same objection,—the witness is not qualified to testify on the expert question.

The COURT.—Overruled.

A. It would.

Q. It would have a tendency to do what?

A. Cause a slide.

Q. State whether or not in your opinion the slide here in question was caused by anything but the action of the water deposited upon the ground?

Mr. HELLENTHAL.—I object to that question on the ground that [122] the witness is not qualified or competent to speak—he neither saw the slide, nor from the testimony present before the Court, in view of all the circumstances—

The COURT.—I think, Mr. Rustgard, that all this witness could testify to, or that an expert witness could testify to, about the cause of a thing, is not what actually did cause it, but what might cause it,—then it is for the jury to say whether those things did cause it.

Mr. RUSTGARD.—Well, he has testified that he has heard all of the evidence in this case. Then after he testified to the conditions under which a

(Testimony of H. P. Crowther.)

slide would be caused, then I asked him not whether or not water from the penstock caused it, but I asked him the simple question whether or not water, no matter where it came from, was the cause of this slide. I did not confine my question to any particular water, because that is a question for the jury.

The COURT.—I think he may answer it.

A. In my opinion the admixture of water with the soil was the cause.

Q. Of the slide? A. Of the slide.

Mr. RUSTGARD.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Crowther, I think you testified that the reason the soil laid in a particular position and occupied the position on the hillside,—if you did not so testify I will ask you if it isn't so,—was because it had reached its proper angle of repose at that point,—that is so, isn't it?

A. Will you ask that question again?

Q. I will state it in a shorter way. Is it not true that the reason the soil occupies any given particular position on the side of a mountain is because it has reached its natural angle of repose?
[123]

A. Well, Mr. Hellenthal, the angle of repose of any given soil is not a fixed angle unless you fix the quantity of water because the quantity of water which is mixed with the soil is the determining factor in settling the particular angle that it will take.

(Testimony of H. P. Crowther.)

If you wish to make your hypothetical question general, it is unanswerable. If you say, will the soil hold at a certain angle provided it is not super-saturated, yes.

Q. You cannot answer my question, then, Mr. Crowther,—is that right?

A. No; and nobody else can.

Q. We will try that again after while—never mind you telling me what somebody else can do. Your knowledge of geology consists of what you have observed as a surveyor, does it not?

A. No, not entirely. I studied geology.

Q. What book on geology did you study?

A. I cannot tell you now any text-books on geology that I studied. I graduated in 1886.

Q. Can you tell me the name of any text-book that has been written in the last few years?

A. Yes, sir.

Q. What?

A. Sir Charles Lysle—his text-book on geology is the standard text-book.

Q. Lysle was a Scotchman that wrote on geology long, long years ago, wasn't he? A. Yes.

Q. And he didn't deal with any such subject as soil or earth deposits, did he?

A. I would hesitate to answer that question because my memory is not good enough after this number of years to answer your question.

Q. Tell me the name of some modern author on geology that you have studied.

A. As I told you, I have studied no text-book

(Testimony of H. P. Crowther.)

on geology since I graduated. [124]

Q. What did you study while you were at school—what book? A. I cannot tell you now.

Q. Who was your professor in geology?

A. I do not claim to be a geologist.

Q. You don't know much about geology then, Mr. Crowther?

A. No, I didn't. I do not set up as an expert along geologic lines.

Q. And all you mean to testify to is if you have a deposit of earth on a sidehill and add weight enough to it by adding water to it it will have a tendency to cause it to slide downhill?

A. That is quite true.

Q. And you would not testify to that, would you, unless there was some place for it to slide to?

A. When you say that it is on a hillside there is naturally some chance for it to slide unless it is already at the foot of the hill.

Q. Is it not true that where soil has become formed by the action of the elements and it is at its natural angle of repose, with its subjacent support intact, that it requires a great deal of weight and a great deal of natural action to cause it to slide?

A. Yes, I think that is a fair statement.

Q. It will not slide under those circumstances until something has been done at the bottom that will permit it to give way,—isn't that the situation?

A. No; as I stated already, Mr. Hellenthal, I think that where you add a considerable quantity

(Testimony of H. P. Crowther.)

of water to soil which is occupying a fixed position on a hillside, that you may change the angle of repose—

Q. Make it heavier?

A. No; you make it less—you thin it out—instead of being a stiff earthy mixture you may thin it out until it assumes a mushy state.

Q. You make it more liquid, you mean?

A. Yes, more of a fluid. [125]

Q. And as it becomes more liquid it will flow easier?

A. Exactly, and then it will take a flatter angle of repose.

Q. But that does not occur until the mass has become so liquid as to flow—is that not true?

A. It will become thinner—I do not know as you would say it would become liquid.

Q. Now, Mr. Crowther, where the soil has been cut away on a hillside—that is to say, if the subjacent support has been taken away from a soil mass on a hillside, that will cause it to slide, will it not? A. It will have that tendency certainly.

Q. That is the way you cause soil to slide when you want it to slide, isn't it?

A. Yes; in hydraulic mining that is customary.

Q. You go to work and cut the toe off?

A. Yes.

Q. Take the support away and down it comes—isn't that the idea? A. Yes.

Q. That is the way you always do in hydraulic mining? A. You would under-cut it.

(Testimony of H. P. Crowther.)

Q. And when you undercut a mass of earth on a hillside you are creating a condition which will slide? A. It would have that tendency.

Q. It may stand it and it may not, but that is the way you would start it to slide, isn't it?

A. Yes.

Q. If you were going to start a slide on the hillside you would make a cut, wouldn't you?

A. Yes.

Q. Make a place for it to slide to, wouldn't you?

A. That is true.

Q. And if in this case a cut has been made immediately below the ground, that would have a tendency to cause the ground to slide, wouldn't it?
[126]

A. It certainly would.

Q. And if in addition to that the ground were covered with snow and the rain fell on that for two or three days, that would have a tendency to saturate it, wouldn't it? A. It would.

Q. The fact that the snow were lying loose upon the ground would prevent the water from running away and cause it all to go in—wouldn't it have a tendency to do that?

A. Well, I think perhaps it would.

Q. It would stop the runoff, in other words?

A. It would tend to check it, yes.

Q. And have a soaking effect? A. Yes.

Q. If that condition existed in this case, that would have a tendency to cause the slide, would it not?

(Testimony of H. P. Crowther.)

A. It would have a tendency to cause a slide.

Q. Now, Mr. Crowther, returning now to the penstock, you don't know much about this particular penstock, do you?

A. No, sir; I don't think I have ever seen this particular one except in these photographs.

Q. You don't know anything about the use that this particular penstock was put to?

A. Not beyond what I—

Q. Beyond that it is a penstock?

A. Yes; and what I have heard about it in this case.

Q. Now, you testified that penstocks generally were employed to keep the air out of the water that went into the service pipe?

A. That, in my opinion, is one of the principal functions of it.

Q. Now, in this case if it should develop from the evidence that the service pipe had a much greater carrying capacity than the flume emptying into the penstock, then this penstock would not serve that kind of a purpose, would it?

A. No; provided you assume that the flow of water through your service pipe that is run off from the penstock— [127]

Q. Provided you assume the service pipe was open?

A. Fully open, yes; and assuming also the truth of your statement that its capacity was greater than the flume.

Q. Exactly. Assuming that the service pipe was

(Testimony of H. P. Crowther.)

open and the carrying capacity of the service pipe was greater than the capacity of the flume, it would not have any such purpose as you have testified to? A. No, it would not.

Q. It would merely serve as a funnel, isn't that right?

A. It would merely be a part of the flume to all practical purposes.

Q. It would serve as a funnel, wouldn't it?

A. No, I wouldn't say that it would.

Q. It would serve as a funnel?

A. No, I don't think that it would.

Q. Well, the water would flow from the flume into the penstock and from that into the service pipe, would it not? A. Yes.

Q. There would be a continuous flow?

A. Yes, more or less so.

Q. There would be no use for a spillway at the penstock,—it would merely be a case of a device for keeping up a continuous flow—is that not right?

A. That is what I have stated. I stated a penstock is a device for maintaining a continuous flow—equalizing the flow.

Q. Yes, equalizing the flow, but let us go a little further. Now assuming that this penstock is as I have indicated, that is to say, that the service pipe flowing from the penstock has a greater capacity than the flume, and the service pipe is kept open so that the flow is continuous, there would be no occasion for an overflow arrangement at the penstock, would there?

(Testimony of H. P. Crowther.)

A. No; provided that your use of the term open means 100 per cent apertion in your service pipe. [128]

Q. Yes, exactly—that is what I mean. I am assuming that the carrying capacity of the service pipe is larger than the carrying capacity of the flume, and that the service pipe is not obstructed—that it is entirely open, there would not, under those circumstances, be any occasion for an overflow at the penstock, would there?

A. No, there would not.

Q. You indicated to the Court, I think, that one reason why a penstock, generally speaking,—not speaking of this particular penstock, was used for storing water was to get a steady flow where the water was employed in a mill?

A. To prevent fluctuations in the service pipe.

Q. You have been in the Alaska Juneau mill, haven't you? A. I have.

Q. Don't you know there is a large tank in the mill which is for that purpose, or don't you know that?

A. There is a large tank in the southeast part of the building that I looked upon as being a wash water tank.

Q. If the Alaska Juneau has a large tank into which the water comes from the service pipe, that tank would serve the purpose that you indicated penstocks generally are used to serve, wouldn't it?

A. Yes, it would—that would act as a local reservoir.

(Testimony of H. P. Crowther.)

Q. Yes, a reservoir, and there would be no need of storing water in the penstock? A. No.

Q. And the penstock could be kept open as I indicated this one was—that is correct, isn't it?

A. I think that is correct.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RUSTGARD.)

Q. In regard to the effect of excavating the toe of the hill, if the ground on the hillside above where the cut was made had [129] become supersaturated to the point of seeking another angle of repose independent of the cut, the cut would not cause a slide, would it? A. No.

Mr. HELLENTHAL.—We object to that, your Honor—there is no such a condition.

Q. And if the slide started above the cut instead of at the cut, the indications would be that the cut had nothing to do with it, isn't that a fact—in starting it?

Mr. HELLENTHAL.—I object to that. That is not a subject of expert testimony—it is a matter of argument.

The COURT.—It is redirect on your cross-examination. We are not talking about this particular cut, but any cut,—if the slide started above the cut, would the cut that you have been asking about have anything to do with it,—that is strictly redirect.

(Testimony of Edwin E. Bussey.)

The WITNESS.—I think that a slide could start independent of a cut, under those conditions.

Mr. RUSTGARD.—That is all.

(Witness excused.) [130]

MORNING SESSION.

March 24, 1921, 10 A. M.

Testimony of Edwin E. Bussey, for Plaintiff.

EDWIN E. BUSSEY, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name, Mr. Bussey?

A. Edwin E. Bussey.

Q. Where do you reside? A. Juneau.

Q. How long have you lived in Juneau?

A. Nearly 7 years.

Q. What is your business? A. Mining.

Q. Were you in Juneau, or in the neighborhood of Juneau, on the 2d day of January, 1920?

A. I was.

Q. The day that the slide occurred? A. I was.

Q. Are you acquainted with the flume and penstock which is located on the mountain-side of Mount Roberts and which is used by the Alaska Juneau Gold Mining Company to carry water for its mill? A. I am.

Q. On the 2d day of January, before the slide,

(Testimony of Edwin E. Bussey.)

did you have occasion to pass this penstock?

A. I passed there in the morning going to work, and in the afternoon coming home from work.

Q. What time in the morning did you pass there, Mr. Bussey?

A. Just about 7 o'clock—might have been a few minutes before or a few minutes after.

Q. At that time did you see any water coming out of the penstock?

A. There was a little bit running over the—

Q. About how much water was coming out of the penstock at that time? [131]

A. Oh, I couldn't say how much—probably fill a 2-inch pipe—maybe not so much, maybe a little more.

Q. Where was this water going to from the penstock?

A. I couldn't say,—it was falling on the ground below the penstock, but beyond that I couldn't say where it went to.

Q. You are familiar with the penstock and its construction, and the trommel screen that was in there, and the spout?

A. I never was inside of it, but I know you have to have a trommel screen.

Q. You know there was a trommel screen there?

A. Yes.

Q. And you could hear that trommel operating when you passed there, could you? A. Yes.

Q. At this time was the trommel running?

A. I don't know,—I didn't pay any attention that

(Testimony of Edwin E. Bussey.)

morning whether the trommel was running or not.

Q. Have you seen any water coming out of this penstock before this, Mr. Bussey?

A. Yes; about three or four times before that.

Q. About how long before that would you say?

A. I couldn't say. I was going to work there 6 months before the slide, or five months, and during that time I saw it several times running over.

Q. Do you know whether or not that trommel ever stopped during that time?

A. Yes; I heard the trommel stop at different times.

Q. After you passed the trommel you went into the mine and attended to your business?

A. Yes.

Q. When did you leave the mine that day?

A. I don't know,—it was in the afternoon sometime—maybe half-past one.

Q. When you came out did you pass the penstock and trommel screen again? [132]

A. Yes.

Q. Was it running then? A. I don't know.

Q. At the time that you passed there in the afternoon about two o'clock, which way did you walk down from the penstock?

A. I came down the trail toward the old administration building, there, straight down the hill.

Q. You came down the steep trail? A. Yes.

Q. That roadway right straight down the mountainside? A. Yes.

(Testimony of Edwin E. Bussey.)

Q. I wish you would show the jury on this exhibit (Plaintiff's Exhibit "A") which trail you came down.

A. I came out of the change room, and came down this trail, and this point is where the Bergmann trail comes down, then I came down this trail and came out on Front Street.

Q. And in the morning I understand you to say you came up this trail?

A. Yes, I came up this trail.

Q. That is the trail that leads from the sidehill there down to the—

A. Bergmann house.

Q. At that time did you notice any water running in that trail? A. When I came down?

Q. Yes, sir.

A. No, there was no water running in the afternoon.

Q. At that time did you see any evidences of any water having come down that trail? A. Yes, sir.

Q. State to the Court and jury what you saw.

A. The trail was washed out very badly from the point—just below the point of the turn down to the head point of the slide there.

Q. That would be from about this turn here, where it branches off? [133]

A. Yes; a little bit below that, down here, is about where I first noticed it—washed out from 20 to 25 feet below that.

Q. And that was washed out from there all the way down to the head of the slide? A. Yes.

(Testimony of Edwin E. Bussey.)

Q. I show you Plaintiff's Exhibit "N," and ask you if that is about a true representation of the way conditions existed about the penstock on the 2d day of January?

A. I don't understand how you mean. Is that the way the hillside looked, you mean, at that time?

Q. Yes, and the location of the penstock?

A. Yes, that is about the location of the penstock.

Q. I show you Plaintiff's Exhibit "J," and ask you if that is the spout which was there on the 2d day of January, 1920?

A. Yes, that looks like it.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Bussey, that trail had been more or less washed out for a long time, hadn't it—more or less, I say?

A. Oh, I never noticed it, that it was washed out much before that time.

Q. Not so much, but it had been washed out some before that time?

A. I couldn't tell whether it had been washed out or dug out when they made it.

Q. There was a trail there anyhow that had been tramped down? A. Yes.

Q. And you went down towards the administration building? A. Yes.

Q. And part of that trail was washed out more

(Testimony of Edwin E. Bussey.)

or less all the way to the administration building, wasn't it?

A. Nothing like it was above that.

Q. I didn't ask you that. I say that trail was washed out [134] more or less—not so much but more or less—all the way down to the administration building?

A. I couldn't say whether it was washed any more than ordinary or not.

Q. It was washed, however, wasn't it?

A. I couldn't say as to that. I never went over that trail enough to know the conditions before that.

Q. You never went over it much before this time?

A. Only occasionally when I come down through town here.

Q. You don't know anything about the condition of the trail before the slide; is that your testimony?

A. Oh, yes; I have been over it a good many times.

Q. It had been washed out some before that time, hadn't it, by surface water coming down?

A. Just in little places.

Q. And this day when you came down part of the trail had been washed more than it was before—that is right, isn't it?

A. A great deal more.

Q. But as you went along down the trail to the administration building, the trail was washed out clear down to the administration building, wasn't

(Testimony of Edwin E. Bussey.)

it? A. I don't think so.

Q. How was the trail at the administration building,—had it been washed at all?

A. I don't think so.

Q. That trail leading to the administration building was not washed at all—is that your testimony?

A. The water seemed to leave the trail right there where the slide occurred.

Q. And from there on down to the administration building the trail did not show any evidence of being washed; is that right?

A. I couldn't say any evidence.

Q. How much evidence did it show of being washed? A. Very little. [135]

Q. Very little, that is right, is it?

A. And the upper part very much.

Q. That is right, is it? A. Yes, sir.

Q. At the point where it spilled over what evidence did you find there of wash?

A. How do you mean?

Q. At that point what had the water done there, at the head of the slide—had it cut a trench down?

A. You could see that the whole hill had slid right out where the water went over it, is all.

Q. The trail did not come right to the head of the slide, did it?

A. It is to the head of the slide now—I couldn't say whether,—no, I think there was about 2 or 3 feet left there between the trail and the head of the slide.

Q. Isn't it a fact there was 15 or 20 feet left there

(Testimony of Edwin E. Bussey.)

at that time? A. I couldn't say as to that.

Q. You don't know as to that?

A. I know there was just a big stump in between the trail and there, which now has slid down into the—

Q. You don't know whether there was more than between 2 and 3 feet between the trail and the head of the slide at the time you were there?

A. I don't think there was over three feet.

Q. You went there for the express purpose of seeing the slide, didn't you?

A. No; I wanted to see the condition below the slide—I didn't go to see the slide—I went to see what was going on down below.

Q. Didn't you stop to see the slide at all?

A. No, I looked just down below.

Q. Didn't stop to see where the slide had broken loose? A. No. [136]

Q. That was the first time you had passed the slide, as you came from the mine that day?

A. Yes, after the slide occurred.

Q. You went out of the mine about 2 o'clock, didn't you? A. Something like that.

Q. And when you went by there that was the first you had ever seen or heard of that slide? You had heard there was a slide before that, hadn't you?

A. I heard there was a slide, in the mine.

Q. And you went that way to see the slide; is that right? A. Yes, sir.

Q. And when you passed that place at the head

(Testimony of Edwin E. Bussey.)

of the slide you didn't see what the evidence was between the trail and the head of the slide, is that right?

A. Not to take any exact measurements of it, or any thought of how far it was.

A. And you didn't observe the slide from that point, is that right? You didn't look at that at all?

A. You mean the upper part of the slide?

Q. Yes.

A. I don't think I did. I just saw she started to slide there, and went on down to the bottom of the hill.

Q. And you don't know whether there was any evidence between the trail and the top of the slide of running water?

A. Oh, it was all brush in there, and this big stump sitting in there.

Q. You don't know whether there was any evidence of running water there or not?

A. No, I couldn't say so.

Q. You only observed the evidence in the trail?

A. That is all.

Q. And you looked at that very carefully?

A. Naturally—it was hard going down there—a good deal harder than it ever was before, for the roots and rocks. [137]

Q. Was there any ice in the trail?

A. Not between where the water started and that point where it left.

Q. No ice there? A. No ice there.

Q. You are sure about that, are you?

(Testimony of Edwin E. Bussey.)

A. I am sure about that.

Q. Just as sure about that as you are of anything else you have testified to? A. Yes, sir.

Q. The trail was absolutely bare and not a bit of ice from the penstock down to the slide?

A. I didn't say the penstock—where I saw the water first washing on the trail there.

Q. Where is that?

A. I couldn't say exactly. Along in here somewhere—10, 15 or 25 feet, something like that, below where the trail started down.

Q. How many feet below the penstock?

A. Oh, probably 75 feet below.

Q. Seventy-five feet below the penstock. From a point 75 feet below the penstock to the head of the slide there was no ice in the trail—that is true, isn't it? A. From where?

Q. From a point 75 feet below the penstock to the head of the slide there was no ice in the trail?

A. I didn't see any, no, sir.

Q. You would have seen ice there if there had been any, wouldn't you?

A. I would be apt to slip on it, yes, sir.

Q. And you watched that trail pretty carefully to see what was washed out, didn't you?

A. Yes.

Q. And if there had been ice you would have seen it? A. Yes, sir. [138]

Q. And you are positive now there was no ice there? A. Yes, sir.

Q. Now, on the morning of the slide you went up

(Testimony of Edwin E. Bussey.)

past the trommel screen about 7 o'clock, and into the mine? A. Yes.

Q. You took the train, I suppose? A. Yes.

Q. Where did you take the train—right at the change house?

A. A little ways in the tunnel there.

Q. That was the same train the rest of the men took to work? A. Yes.

Q. When you went past the penstock you say you don't know whether the screen was revolving or not?

A. No, I couldn't say that.

Q. On the previous occasion when you testified you said you saw water coming out of there two or three times, didn't you? A. Yes, sir.

Q. You don't remember the dates? A. No.

Q. But you remember two or three times the water was coming over there? A. Yes, sir.

Q. And the amount of water that was going over was comparatively small? A. Yes.

Q. And on those occasions when you saw the water going over the screen was standing still?

A. I think so.

Q. That is your best recollection, that the screen was standing still? A. Yes.

Q. This time you don't know whether the screen was revolving or standing still? A. No.

Q. Who else was on the trail with you? [139]

A. I was alone.

Q. There were men behind you and ahead of you, weren't there?

A. I don't know whether there was any behind

(Testimony of Edwin E. Bussey.)

me or not; there was some ahead of me I know.

Q. Just ahead of you?

A. I couldn't say—I didn't see any lights that morning.

Q. There were other men took that train that morning?

A. Yes, several men took the train at the same time that I did.

Q. That little squirt of water, you didn't stop to look at it very long?

A. No, only just to flash my light on it.

Q. And you walked by? A. Yes, sir.

Q. And as the light reflected on it you saw the water coming from the spout?

A. I heard the water and I flashed my light and looked at it.

Q. You don't know whether the screen was standing still or not? A. No, sir.

Q. Mr. Bussey, now, you have had a little trouble in the mine, haven't you?

A. A little trouble in the mine?

Q. You are not on the best terms with the company? A. I don't know why.

Q. Aren't you sore about a contract that you didn't get a while ago that you thought you ought to get?

A. No; I put in my bid the same as the others did, and they got it and I didn't.

Q. You put in your bid? A. Yes, sir.

Q. And you didn't get the contract?

A. No, sir.

(Testimony of Edwin E. Bussey.)

Q. And that is why you are a witness here?

A. No, sir.

Q. That is why you saw the water coming from the spout, isn't it? A. No, sir. [140]

Q. And that is why you saw the trail washed out?

A. No, sir.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. Are you in the employ of the Alaska Juneau Gold Mining Company now, Mr. Bussey?

A. I am.

Q. Do you expect to get fired? A. No.

Mr. HELLENTHAL.—I object to that.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Fred Newman, for Plaintiff.

FRED NEWMAN, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is Fred Newman? A. Yes, sir.

Q. What is your business? A. Mining.

Q. How long have you been around Juneau, Fred? A. Oh, it is close to eight years now.

Q. Were you in Juneau at the time of the slide?

A. Yes, I was.

(Testimony of Fred Newman.)

Q. Where were you living then?

A. I was living downtown here.

Q. Whereabouts downtown?

A. On Gold Street—123 Gold Street. [141]

Q. Now, you went to work on the morning of the slide in the mine, did you? A. Yes, I did.

Q. About what time?

A. Oh, something around 7 o'clock—a little before.

Q. How long did you stay in the mine that morning—until about what time?

A. I was in until about 11 o'clock.

Q. Then you came out again, and where were you going to when you came out—where were you headed for?

A. I was heading for the house where I was stopping.

Q. That was located where, did you say?

A. That was located down on Gastineau Avenue.

Q. Where was it with reference to the Koski house—you know where the Koski house was?

A. Yes, I know it.

Q. Were you living in the Koski house?

A. I was living in the Koski house at the time.

Q. That is what I am trying to get at. After you left the mine you were going to your home?

A. Yes.

Q. At the Koski house? A. I was.

Q. When you came out of the mine did you pass the penstock? A. Yes, I did.

(Testimony of Fred Newman.)

Q. Did you see any water coming out of the penstock at that time?

A. Yes, there was quite an overflow.

Q. About how much of an overflow would you say it was,—how big a box would you say it would take to carry it off?

A. Well, I estimate a 12 inch box would carry it—something like that.

Q. Where was this water coming from, Fred?

A. It was coming from the flume.

Q. What portion of the flume,—I mean how was it discharged? [142]

A. Why, it was coming through the screen, and then they had made an outlet on the outer side of the screen, and there was the water coming out.

Q. That is what we call the chute here?

A. Yes.

Q. Kind of a sheet-iron trough? A. Yes.

Q. How long before the slide would you say that you saw this water coming out of the chute?

A. It couldn't have been more than ten minutes before the slide—I saw it when I passed by there.

Q. And you passed by there, and which trail did you take to get down?

A. I took the Bergmann trail.

Q. You took the Bergmann trail. Why didn't you take the trail straight to the Koski house?

A. I didn't take it on account of the water.

Q. On account of which water?

A. The water was overflowing right down on the

(Testimony of Fred Newman.)

trail, across the trail, right where the two trails cross.

Q. And the reason you didn't take the trail straight to the Koski house—that is, this trail here—here was the Koski house—was because the water was flowing in here, and you took the trail along the sidehill? A. Yes, I did.

Q. Which leads down to the Moose Hall and the Bergmann? A. Yes.

Q. Where were you, about, Fred, at the time of the slide?

A. I was right down on the sidewalk there, across from the Moose Hall.

Q. You were just about the Moose Hall, then, I suppose, you heard the crash?

A. Yes; I was just starting up towards the house, and I saw the house pass by there—I saw the roof of the Koski house. [143]

Q. Had you ever seen any water coming out of the chute before this time? A. Yes, I have.

Q. About how long before?

A. Why, sometimes it might took a year between, and sometimes been only a little while when I seen it.

Q. About how often would you say?

A. I couldn't say exactly how often, but I know I seen it four or five times before that overflow.

Q. Within six months prior to the slide?

A. No, I cannot exactly state. It was something between five and seven months before; when I saw

(Testimony of Fred Newman.)

it it was quite a heavy overflow there and it washed out the trail.

Q. It washed out the trail that time?

A. Yes.

Q. Did you ever see that trommel screen stop there, Fred? A. Yes, I have.

Q. About how often did that happen?

A. Why, I haven't paid any attention to that except the times when it has overflowed.

Q. Your best recollection now is whenever it overflowed the trommel screen was stopped?

A. That is my idea about it.

Q. The usual way you took when you went home was to go down the steep trail?

A. Yes; that led right down to the house.

Q. And on this occasion you did not take it because it was full of water? A. Yes.

Mr. RODEN.—You may cross-examine. [144]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Newman, you don't know when it was any more now that you saw water coming out of that spout before,—I say you don't remember the dates? A. Oh, no.

Q. It was three or four times before that you saw water coming out?

A. Yes, I have seen it at times.

Q. You don't know when it was?

A. No, I couldn't state that.

Q. One time was about five or seven months before the slide?

(Testimony of Fred Newman.)

A. It was something like that—I know it was in the spring of 1919.

Q. In the spring of 1919, and at that time there was quite a little water coming out?

A. Yes, there was quite a bit.

Q. And the screen was standing still, wasn't it?

A. Yes, it was.

Q. It was always standing still when the water came out, that is your best recollection—as far as you remember?

A. No; I have seen a little coming out when the screen was running, too—coming out with the mud.

Q. A little water might squirt out with the leaves, you mean?

A. With the leaves; but any time it lets it out any heavier I think it stopped.

Q. What you mean to say is that when the screen is running, when there is a big bunch of leaves going over it might carry a little water with the leaves, in revolving? A. Yes.

Q. But if it was revolving there would be no water running except a little squirt that would come out with the leaves? A. Yes.

Q. That might happen once in a while?

A. Yes. [145]

Q. But if the screen was running there would be no overflow? A. No.

Q. Mr. Newman, you went up to the mine the day before, didn't you, January 1st?

A. Yes, I did.

Q. What time did you go up that day?

(Testimony of Fred Newman.)

A. I went up the usual time, a little before 7 o'clock—something like that.

Q. And you came back about 4 o'clock?

A. Yes, I did.

Q. Now, as you went by the screen that morning and that evening it was running and there was no water running over, is that right?

A. No, there was no overflow whatever then.

Q. There was no trouble on the 1st of January?

A. No.

Q. And when you came back on the first day of January it was just before dark, wasn't it?

A. Oh, I don't know.

Q. About four o'clock, wasn't it?

A. About 4 o'clock.

Q. And the screen was running, and there was no water running over it? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. And when you went to work on the morning of the 2d you passed by the screen at seven o'clock, didn't you? A. Yes, about 7 o'clock.

Q. And at that time the screen was running and there was no water running over the top?

A. No, not that I noticed.

Q. The screen was running and everything was going all right? A. Yes. [146]

Q. Now, that morning you left the mine about 11 o'clock, I think you said?

A. It must have been something like that.

Q. Came out on the train, didn't you?

A. Came out on the ore train.

(Testimony of Fred Newman.)

Q. You took the ore train, where, Mr. Newman,— somewhere in the mine, wasn't it?

A. Somewhere in the mine—I don't exactly know.

Q. And you got off the train in the No. 3 tunnel?

A. In No. 3 tunnel, right off the—

Q. You got off the train at the place where the two tunnels fork and come together?

A. Yes.

Q. There was an old portal of the tunnel came out at the change house; then there was a new tunnel driven that meets No. 3 tunnel a little ways in, that is right, isn't it? A. Yes.

Q. And the place you got off the train is where those two tunnels come together? A. Yes.

Q. And at that place there are lights so you can see to get on and off the train? A. Yes.

Q. And those lights were off? A. Yes.

Q. There were no lights when you got off of the train that morning? A. Yes.

Q. That is true, isn't it? A. Yes.

Q. And then you walked from there to the trommel screen? A. Yes.

Q. When you got to the trommel screen the water was coming through the spout?

A. Yes, sir. [147]

Q. The trommel screen was standing still?

A. Yes.

Q. You are sure the trommel screen was standing still? A. Yes, I am sure.

Q. And the water was running down the hillside?

(Testimony of Fred Newman.)

A. Yes.

Q. When you heard that water coming out of there what was your first idea about notifying the company?

A. My first idea, I stepped inside and wondered if it would be any use to go in and try to get that going if I can do it, and then it ran in my mind that I hadn't ever been in there and I didn't know how it worked, and I thought the only thing to do was to come right down to the house and telephone to the power-house.

Q. You knew that that thing shouldn't be—that there was something wrong? A. Yes, sir.

Q. And you were going to tell the company, and your idea was to go down to the Koski house and ring up the office and tell them that thing was running over?

A. That was my idea about it.

Q. And you got down the hill and you found there was so much water running down the trail that you couldn't go down to the Koski house—that is, not very handy? A. Not very handy; no.

Q. And you went down the trail that goes to the Bergmann? A. Yes.

Q. And you continued down that way until you got to the Moose Hall? A. Yes.

Q. After you left the place where these two trails meet, the trail going to the administration building and the trail going to the Bergmann, and from that time on your back was towards the Koski house, wasn't it? A. Yes, it was. [148]

(Testimony of Fred Newman.)

Q. You didn't see any electric flashes at all?

A. I didn't pay any attention to that.

Q. Didn't see any electric flashes at all?

A. No.

Q. At any time that morning?

A. No, not that I saw.

Q. When you got to the place where you turned to go to the Koski house, and that was right near the Moose Hall, you saw the buildings going through the bridge, didn't you?

A. Yes, I did.

Q. That was the first you saw of the slide, wasn't it?

A. That was the only thing I saw of the slide.

Q. You saw the bridge,—when I say bridge I mean the bridge on Gastineau Avenue?

A. I didn't see the bridge—I saw the roof of the Koski house going through the bridge there.

Q. That is what you think, but you couldn't see the bridge from where you were,—the bridge was too low? A. The bridge was too low.

Q. But you could see that the roof of the building was moving at the place where the bridge crossed?

A. Yes, sir.

Q. And you could hear the cracking of the buildings as they went through the bridge? A. Yes.

Q. And that was the first you knew of the slide?

A. Yes; that was the first I knew of the slide.

Q. That trail, if it was good walking, you could walk from the penstock to the Moose Hall in about

(Testimony of Fred Newman.)

three minutes, couldn't you, if the trail was good—no ice in it? A. Yes.

Q. This morning how did you find the trail—icy or otherwise?

A. It was icy almost all the way down.

Q. It was very icy, wasn't it? [149]

A. Yes, it was pretty slippery.

Q. And it took you a little more than three minutes on that account?

A. I think it took us nine or ten minutes.

Q. It took you longer than usual because of the slipperiness of the trail? A. Yes.

Q. You looked at your watch, didn't you, when you got to the Moose Hall? A. Yes, sir.

Q. What time was it?

A. Just when I got down to the sidewalk I looked at my watch and it was half-past eleven.

Q. That is what your time was?

A. By my time, but my time was fast—it was 13 or 14 minutes fast.

Q. What would be the cable time?

A. I think it must have been about 19 minutes past eleven.

Q. About 19 minutes after eleven you got to the Moose Hall? A. Yes.

Q. That was cable time? A. Yes.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. The slide happened before you had an opportunity to telephone to the company?

(Testimony of Fred Newman.)

A. Yes, it did.

Q. And your idea for telephoning was because you realized that water running over there was likely to cause damage, wasn't it? A. Yes.

Q. The ice you speak of was on the trail which you took—that is, this trail here?

A. Yes; that is the Bergmann trail. [150]

Q. Yes, the Bergmann trail, coming down the sidehill? A. Yes.

Mr. RODEN.—That is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. There was ice all the way down, wasn't there, Mr. Newman, on the other trail, too?

A. From the place where the two trails split there was ice almost all the way down, but right up there at the curve, from this curve right here, from here down to here, just at that point here it was icy, but this here space was bare—there wasn't any ice in that.

Q. That place was a little protected?

A. Yes; there is trees over it and it don't get much snow.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) And at that time when you came down you don't know what the condition of this trail was, as to being icy or not?

A. I think it was a little icy in the morning when I went up.

Q. (By Mr. RODEN.) I mean just before the

(Testimony of Fred Newman.)

slide? A. No, I don't know anything about it.

Q. (By Mr. RODEN.) Who was with you at the time you came out of the mine about eleven o'clock or so? A. Jack Johnson was with me.

Mr. RODEN.—That is all.

(Witness excused.) [151]

Testimony of Jack Johnson, for Plaintiff.

JACK JOHNSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Jack Johnson.

Q. What is your business? A. Mining.

Q. Are you the Jack Johnson that Mr. Newman said was with him at the time he came out of the mine? A. Yes, sir.

Q. About what time in the morning was that?

A. When we went up to the mine?

Q. No, when you came back.

A. That was about 11 o'clock.

Q. Did you pass the penstock and trommel screen that morning? A. Yes.

Q. Did you see any water coming out of the penstock? A. Not in the morning.

Q. I mean about 11 o'clock when you came out of the mine?

A. We left about eleven, and when we came there was quite a bit of water coming over there.

(Testimony of Jack Johnson.)

Q. Where was this water coming from?

A. It was coming from the penstock.

Q. About what size box would it take to carry off this water, practically speaking?

A. That is kind of hard to judge, but I kind of judge it should take a 12-inch box, or probably bigger.

Q. Now, at that time do you know whether the trommel screen had stopped?

A. Well, it was stopped at that time.

Q. Did you come down the trail with Mr. Newman, down to the Moose Hall? [152]

A. Yes, he come with me.

Q. When you were down near the Moose Hall you heard the buildings crash down through the bridge there? A. Yes.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Johnson, you went to work in the morning the day before, didn't you? A. Yes.

Q. Went around 7 o'clock.

A. Around 7 o'clock.

Q. You took the train in the morning?

A. That is right.

Q. And you came back the evening of the first at about what time?

A. Oh, around 4 o'clock—something like that.

Q. Just before dark?

A. Yes; I guess it was a little dark then already.

(Testimony of Jack Johnson.)

Q. It was just getting a little dark? A. Yes.

Q. When you went up that morning of January 1st, and came back, you went by the trommel screen, didn't you? A. Yes.

Q. And the screen was running in the morning and also in the afternoon?

A. It was running in the morning.

Q. And also when you came back?

A. Not when we came back.

Q. I mean the day before the slide—I am not talking about the day of the slide, but the day before—New Year's day.

A. Yes, it was running then.

Q. And there was no water coming from it either time? A. Not that I noticed then. [153]

Q. When you went up in the morning the day of the slide you went by that trommel screen again, didn't you? A. Yes, sir.

Q. And the screen was running all right then, wasn't it? A. Yes.

Q. And there was no water running from it at that time? A. Not that I noticed.

Q. Then you went to the mine? A. Yes.

Q. And you quit a little early that morning because the lights were out?

A. Yes; we quit about 11 o'clock.

Q. And you took the train out, didn't you?

A. Yes.

Q. You took the train in the mine? A. Yes.

Q. You got off the ore train at the same place Newman got off, in No. 3 tunnel, didn't you?

(Testimony of Jack Johnson.)

A. Yes, sir.

Q. That is where the two tunnels come together?

A. Yes.

Q. Where the old tunnel and the new tunnel meet? A. Yes, sir.

Q. There is a place there where men get off and on the train? A. Yes.

Q. And there are lights there so you can see to get off and on? A. Yes, sir.

Q. This day of the slide the lights were out?

A. Yes; there were no lights then.

Q. When you got to the trommel screen the trommel screen stood still, didn't it? A. Yes, sir.

Q. And the water was running over it?

A. Yes, sir. [154]

Q. You went directly to the Moose Hall?

A. Yes.

Q. You saw no electric flashes that morning either, did you? A. No.

Q. No electric flashes at all? A. No.

Q. That looked like lightning or anything of that kind? A. No.

Q. You went to the Moose Hall and you saw the buildings also when they were going through Gastineau Avenue; isn't that right?

A. I heard them when they crossed the street there.

Q. When they were crossing the street?

A. Yes.

Q. That is you could see by the roof of the Koski house that the Koski house was going across the

(Testimony of Jack Johnson.)

street,—that is Gastineau Avenue you mean by the street, don't you? A. Yes, sir.

Q. And you could hear the buildings crack as they went through the street? A. Yes.

Q. That is the first you saw of the slide, was it?

A. That was the first I saw.

Q. That is right, isn't it? A. Yes.

Q. That trail leading from the penstock down to the Moose Hall was icy, wasn't it?

A. Yes, it was icy.

Q. So icy you couldn't walk as fast as you could have walked had it been—

A. Oh, no; we couldn't walk as fast as we used to do when the trail was good.

Q. If it was good walking you could make it down there in three minutes, but it took you considerably longer?

A. Oh, I think it would take a little more than three minutes [155] if the trail was good.

Q. If you walked fast you could make it in three minutes, if the trail was real good; isn't that right?

A. Yes.

Q. This morning almost the whole trail was covered with ice?

A. Almost the whole trail was covered by ice—there may have been a few bare spaces, but not many.

Q. There might have been a few bare spaces, but the most of the trail was covered with ice?

A. Yes.

Q. And the ice on there impeded your speed so

(Testimony of Jack Johnson.)

it took you a little longer? A. Yes.

Q. That is right, Mr. Johnson, isn't it?

A. That is right, yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [156]

Testimony of William Geddes, for Plaintiff.

WILLIAM GEDDES, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is William Geddes?

A. William Geddes.

Q. What is your business, Mr. Geddes?

A. For the past two years I have been in the boat business—that is, the cannery business.

Q. Were you in the town of Juneau on the 2d day of January, 1920, the day on which this slide occurred? A. Yes, sir.

Q. That morning did you have occasion to go up or down Front Street prior to the slide?

Q. My boat was anchored at the lower city float, or tied to the lower city float, and I was on the way down to the boat between the hours of 10 and 11, I guess—somewhere in there.

Q. Did you look up on the sidehill in the direction of the flume and penstock that is operated by the Alaska Juneau Gold Mining Company?

(Testimony of William Geddes.)

A. I did.

Q. Did you see any water coming out of there?

A. I did.

Q. Where was this water coming from, Mr. Geddes?

A. It looked to me at that time, because I stopped and spoke about it, to be a stream about 30 inches wide—how deep I couldn't tell. It looked to me at that time as if it was the flume, but afterwards looking at it I saw it was the penstock.

Q. Where was this water going to?

A. It didn't seem to show up any place—seemed to be shooting out on a hog-back there—on the ground—coming out of the flume and hitting on the hog-back.

Q. There was a lot of timber and brush up there and you couldn't follow that water, could you?

A. No, sir. [157]

Q. Did you see the water at any place further down the hill?

A. Down towards the bottom of the hill?

Q. Yes. A. No, I never noticed.

Q. About what time in the morning was it when you saw this water coming out of there?

A. I am at a loss to say—it was just about 30 minutes, however, I think before the slide occurred.

Q. After you saw this you went down to the lower city float? A. No, sir.

Q. You were coming this way?

A. No; we went down to the present city dock and it was raining so hard that we turned around

(Testimony of William Geddes.)

and came out and took a look at Gold Creek.

Q. Where were you when the slide occurred?

A. Just about Cash Cole's barn, the other side of the old Pacific Coast dock here.

Q. Did you then turn back?

A. We turned back, yes, sir.

Q. Did you see any water coming out of this same place then?

A. After we got back on to the present Pacific Coast dock, why, we saw water coming out of the same place, yes, sir.

Q. Was the volume coming out about the same?

A. That I couldn't tell because I didn't notice the last time—I stood there and looked at it but I didn't see whether it was the same volume or not.

Q. Did you see any water at that time coming over the slide area?

A. Oh, I saw it hit on top of the slide, yes.

Q. Did you go down then and look at the slide?

A. Yes, sir.

Q. Was the water running there then when you got down there? A. Yes, sir.

Q. I suppose you walked just about as fast as you could after the slide happened to get down to the scene of the slide?

A. I ran across the old Pacific Coast dock on to the new dock. [158]

Q. It would be a matter of a few minutes for you to get down there?

A. Oh, I should judge it was 4 minutes—three or four minutes.

(Testimony of William Geddes.)

Q. And when you got down there the water was still running? A. Yes, sir.

Q. And coming out of this penstock?

A. Yes, sir.

Q. Running over the slide area? A. Yes, sir.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Billy, you were at the city float, you say, shortly before eleven o'clock, or in that neighborhood? A. At the city dock, yes.

Q. And from there you looked up on the hillside?

A. No, sir.

Q. Wasn't it from there that you looked up?

A. No.

Q. From the city dock?

A. No, sir; it was passing by the front of the soda works, on the way down.

Q. Oh, on the way down—you were on Front Street? A. On Front Street; yes, sir.

Q. And you looked up the hillside then and you saw a stream of water about 30 inches wide coming from what seemed to you to be the Alaska Juneau flume? A. Yes, sir.

Q. At that time it looked to you as though it was coming right over the flume?

A. No, it was a square volume of water.

Q. Yes, it was a full stream, and in one stream?

A. One stream.

Q. Looked as though it was coming from the flume at some place?

(Testimony of William Geddes.)

A. At that time it did. [159]

Q. The stream was about how wide?

A. Well, I should judge,—

Q. Just a guess.

A. Yes, it is a guess—about 30 inches, it looked to me at that time, because I remarked to a man that was with me about this stream.

Q. It was a thin stream coming over the flume?

A. Oh, I couldn't tell the volume because it was way up on the hill.

Q. You couldn't see the thickness, could you, Billy?

A. No, you couldn't—you couldn't tell at that distance just the thickness of the water.

Q. The stream was facing you so that you couldn't see through the stream of water?

A. No, you couldn't see through it.

Q. It was a flat stream apparently about 30 inches wide, running down from the level of the flume—that is right, isn't it?

A. Yes; it came from the flume, just on the bend where she comes around—that is the way it looked to me,—I didn't examine it at all.

Q. Right where the flume bends, where it comes around there, there seemed to be an overflow there about 30 inches wide, you think? A. Yes.

Q. And that is how it looked to you at that time?

A. Yes, sir.

Q. You didn't observe it any more that morning until after the slide?

A. Until after the slide.

(Testimony of William Geddes.)

Q. Now, that was the only stream of water you saw running in that neighborhood, wasn't it, Billy?

A. Oh, lower down—

Q. I know, but I mean—

A. Yes, sir. [160]

Q. There was water running in the gulches, but that was the only stream you saw on that flume level? A. Yes, sir.

Q. And later on, as you considered it, you thought instead of coming from that flume that it might have come from the penstock,—that is your idea, isn't it?

A. After going back the second time I saw where it came from—that is after the slide—I noticed it was the penstock.

Q. After the slide you noticed it came from the penstock?

A. Yes; the overflow from the chute of the penstock.

Q. That is the time? A. Yes, that is the time.

Q. But that was after the slide had happened?

A. Yes, sir.

Q. About 5 minutes or so after, you think, Billy?

A. Just about.

Q. You have seen water running down that hillside down by Goldstein's store many times, haven't you, Billy?

A. More or less in the gulches in heavy rains.

Q. When there was a heavy rain it used to run into the store when you were there, didn't it?

A. There was one time there was some water

(Testimony of William Geddes.)

come in; the store is lower than the ground, and it ran in—we had a rain—

Q. Just heavy rains come down that gulch. There is a gulch that comes down right behind the store or right near the store?

A. I don't know—I don't hardly think there is a gulch—it branches off the other way.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. This water which you saw coming into the store wasn't a stream of water—it was seepage coming out of the bank?

A. Seepage coming out of the bank and the bulkhead, yes, sir. [161]

Q. You are positive that the water coming down before the slide came from the same place that you saw it coming from after the slide?

Mr. HELLENTHAL.—We object—the witness has gone all over that, and it is a leading question. The witness has stated what his impression was,—he has stated how it seemed to him at first and how it seemed to him afterwards.

The COURT.—I think the objection to the question is that it is decidedly leading, but I do not think there is any objection to getting it straight before the jury.

Q. All right, I will ask it again. The water which you saw before the slide, Mr. Geddes, where was that coming from? A. Before the slide?

(Testimony of William Geddes.)

Q. Yes.

Mr. HELLENTHAL.—That is not redirect, your Honor.

Mr. HELLENTHAL.—That is all.

The COURT.—I know, Mr. Hellenthal, but there seems to be some uncertainty about the two streams of water and counsel is entitled to get it straight before the jury so the jury will know just what his testimony is.

A. It was coming from a chute.

Q. From the chute? A. Yes, sir.

Q. Where was the water coming from which you saw after the slide? A. From the same chute.

Mr. RODEN.—That is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. That wasn't your impression at the time you first saw it, was it, Billy? A. Yes, sir.

Q. When you first saw it? Didn't you just testify to me that to your appearance when you were in front of the soda works the water looked to you as though it came from the flume, at the place where the flume bends—that is right, isn't it,—[162] that is the way it looked to you at that time, isn't that right?

A. It looked, if I might explain, as if there was a chute in the flume,—it looked as if the flume had been cut and a chute put in at that point.

Q. It looked as if there was a chute in the flume at the bend, and the water was coming out of there?

(Testimony of William Geddes.)

A. At first, yes.

Q. That is right, isn't it? A. At first, yes.

Mr. HELLENTHAL.—That is all.

Mr. RODEN.—I show you Plaintiff's Exhibit "J"—is that the chute you are speaking about?

The WITNESS.—I couldn't tell because I never was up there and you would have to be close to observe that chute behind the bend and one thing and another—I couldn't tell from that exhibit.

Mr. HELLENTHAL.—You were where you could not see that chute—from where you were you couldn't see that chute?

A. I don't know whether I could see this present chute or not.

Mr. HELLENTHAL.—It was too far away?

The WITNESS.—Well, this is built in that way—I couldn't see it.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [163]

Testimony of Clarence Geddes, for Plaintiff.

CLARENCE GEDDES, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is Clarence Geddes? A. Yes.

Q. What is your business?

A. I operate a gas-boat.

Q. Were you in the town of Juneau on the 2d

(Testimony of Clarence Geddes.)

day of January, 1920? A. I was.

Q. At the time of the slide that morning, Mr. Geddes, did you have occasion to pass the soda works on Front Street in the town of Juneau?

A. I did.

Q. About what time were you down there?

A. Between 10:30 and 11:30—somewhere in there.

Q. At that time did you look up the sidehill in the direction of the penstock and the flume operated by the Alaska Juneau Gold Mining Company?

A. I did.

Q. Did you see any water coming out of that flume or penstock, in there? A. I did.

Q. Where did you see the water coming from?

A. As near as I could judge the water was coming out of what was known as the penstock.

Q. How much water was coming out of there, Mr. Geddes?

A. Well, I should judge between a 36 and 40-inch stream.

Q. Where was this stream running to?

A. Well, as near as I can make out, it was dropping down on top of a hog-back there—from there on I couldn't see.

Q. About what time was that in the morning, as near as you can recollect?

A. About 10:30 or 11—somewhere in there. [164]

Q. After you had seen that what did you do?

A. I walked down to the city dock, looked around the city dock a while, and then walked back again.

Q. Where were you at the time of the slide?

(Testimony of Clarence Geddes.)

A. Right in front of Cash Cole's barn.

Q. Did you go back and look at the slide then?

A. The minute I heard the slide coming down I started to run over towards the slide.

Q. Did you see any water there then?

A. The water was running for about 30 minutes after the slide.

Q. The water which you saw then, where was that coming from?

A. Oh, from exactly the same place—from the penstock.

Q. Where was it running with reference to the ground which broke loose in the slide?

A. The water, as near as I could make out, was hitting right down on top of where the slide started from.

Q. About how long did it take you to get from Cash Cole's down to the scene of the slide?

A. I couldn't say—I ran all the way—I suppose a couple or three minutes—somewhere along there.

Q. And at that time you saw the water running at the same place? A. Exactly.

Q. And hitting on the ground where it broke loose?

A. At the same spot where the ground caved in.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. In the morning you went down to the city wharf, you say? A. Yes.

(Testimony of Clarence Geddes.)

Q. About half-past ten or eleven o'clock?

A. Exactly.

Q. Might have been five minutes after eleven?

A. I don't think it was anywhere around eleven,—it might have been half-past ten, but I don't think it was any later. [165]

Q. Didn't you just say you thought it was between half-past ten and eleven?

A. Somewhere in there; yes.

Q. Eleven would be in there, wouldn't it?

A. Yes.

Q. If it was about eleven o'clock, wouldn't that be about as near a guess as you can make of it?

A. Somewhere in there.

Q. Might have been five minutes earlier or five minutes later? A. Yes.

Q. Then you saw a stream of water coming from the level of the Alaska Juneau flume?

A. From the end of the Alaska Juneau flume.

Q. Who drilled you on that end of the flume business?

A. No one drilled me on the end of the flume business.

Q. How wide was that stream?

A. 36 to 40 inches.

Q. 36 to 40 inches wide, a flat stream that was coming down right straight towards you, you couldn't tell how deep it was?

A. Yes; I was standing in front of the Alaska Soda Bottling Works there when I first noticed it.

Q. You were facing it? A. Yes.

(Testimony of Clarence Geddes.)

Q. Could you see just how wide it was?

A. Not the exact width of it, but as near as I can place it.

Q. Of course you couldn't tell from that distance the exact width? A. No.

Q. But you thought at that time it was a 36 or 40-inch wide stream, in that neighborhood?

A. Yes.

Q. You couldn't tell how deep it was? A. No.

Q. Couldn't tell the depth of it? A. No.

Q. Could only tell the width of it? [166]

A. Yes.

Q. It was running straight towards you so you could only see the face of it? A. Yes.

Q. Then you went down to the city wharf, and then you walked up town again?

A. Walked up town.

Q. You walked up towards town and then after the slide you went back? A. Yes.

Q. How far did that water drop before it hit the ground? A. 65 or 70 feet, I should judge.

Q. 65 to 70 feet from the place where it spilled over there until it hit the ground? A. Yes.

Q. How many streams of water did you see—only one stream? A. Only one that I noticed.

Q. There was only one stream coming from the flume? The water in the gulches, I don't mean that, but the water coming from the flume? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. Now, it was raining hard, wasn't it?

A. It was.

(Testimony of Clarence Geddes.)

Q. Very hard? A. Very hard; yes, sir.

Q. And had been raining very hard all that forenoon, or pretty much of that forenoon—that is right, isn't it? A. It is.

Q. Were you ever up to the Alaska Juneau flume? A. I never was up to the flume; no.

Q. You don't know where the penstock is, do you?

A. From what I understand, it is right on the end of the flume.

Q. It has been pointed out to you on these pictures, hasn't it? [167]

A. It has not—I have never seen the pictures of it.

Q. You have been told there was a penstock at the end of the flume?

A. For the last year and a half I have known there was a penstock, but I supposed it was a flume.

Q. What kind of a thing was the penstock up there? Describe it to me.

A. As near as I can understand, it was a square box—

Q. Tell me from what you saw,—how did it look to you? You can not tell, can you—from the street where you were you could not tell, could you,—you have never been where you could see it—isn't that right? A. Yes, sir.

Q. Describe the penstock to me.

A. As I said, I was told that was the penstock, but it looked to me like it would be the end of the flume, from where I was.

Q. You don't know whether it was a penstock or

(Testimony of Clarence Geddes.)

what it was, do you? A. No.

Q. You don't know whether there was a penstock up there only from what they told you?

A. That is all.

Q. You don't know where the penstock was—whether it was near the end of the flume or not, from your own knowledge?

A. Not the penstock, but I know where the water was running there.

Q. You didn't know where the penstock was, did you—that is true?

A. As I told you before, I don't know whether there was a penstock there only from what I have been told.

Q. You couldn't trace that water down the hill when you were in front of the soda works—that was the time you saw the water running down the hog-back, was it, and that was the second time you testified to?

A. It was about 45 minutes before the slide, I should judge, that I seen the water coming down the hill, and by the time I walked back again until the slide occurred— [168]

Q. When you walked back the second time was when you saw it coming over the hog-back, isn't that true? A. On *my* down to the city dock.

Q. That water was running through the brush, wasn't it—wherever it was running?

A. I couldn't tell whether it was running down the hill or not but I could see the water from the top of the flume.

(Testimony of Clarence Geddes.)

Q. You couldn't tell where it was running down the hill? A. No.

Q. All you know, at that time the water was running from the top of the flume level and then fell 60 or 70 feet? A. Yes.

Q. And then you lost track of it? A. Yes.

Q. And when you talk about the water coming on the hog-back, that is when you were up there later on? A. Yes, sir.

Q. That is true, isn't it? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [169]

Testimony of Isadore Goldstein, in His Own Behalf.

ISADORE GOLDSTEIN, the plaintiff herein, upon being called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Isadore Goldstein.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau, Mr. Goldstein? A. Thirty-four years.

Q. Whereabouts are you living in Juneau?

A. Lower Front Street.

Q. Do you know the number of the lot and block you are living in?

A. Yes; it is 136 Franklin Street—lot 1, block M.

Q. Now, were you living in the town of Juneau on the 2d day of January, 1920, at the time of the slide? A. I was.

(Testimony of Isadore Goldstein.)

Q. What time in the morning did you get to your store? A. At about 9 o'clock.

Q. Was your attention at that time, or soon after, called to anything unusual that was happening?

A. Not at that time, nothing unusual.

Q. Well, did anything unusual attract your attention shortly after that time?

A. About, I should imagine, along about 11 o'clock or five minutes to 11—something like that.

Q. What attracted your attention then?

A. I was in the store with another man—I was working on my books, and this man was standing in front of my desk talking to me; all at once I heard a big rush of water and I said to that fellow, "My God, listen to that water—there must be a hydrant or water-main busted up on the hill." So we started out the back door to see where that water was coming from, and as we [170] opened the door the water rushed right in through the back there, and he and I walked out and I said, "It is going to flood the store." I said, "Let's see if we can't ditch it, and try to get it to go under the foundation and out on to the beach"; and he and I got to work with sticks trying to punch holes under the store to see if the water wouldn't go under the store out to the beach, and as we were working out there I heard a crash and I said, "My God, Louie, here comes a slide—let's beat it," and so we rushed out the front door of the store. As we were going out the front door the slide hit the back of my building

(Testimony of Isadore Goldstein.)

and the water and mud and everything went rushing through the store.

Q. What did you do after that?

A. We heard people hollering for help. I had an apartment house back of the store, and I thought it was the people up there, and so I started up over the building to go to where they were. I said, "There is a woman caught in that apartment; let's see if we cannot get her out." He and I started over the building to get to where these people were.

Q. At that time did you see where this water and debris in your store came from?

A. Didn't see until we got on top of the building.

Q. Did you see it then?

A. We got up on top of the building, and looked to see where the water was coming from, and it was coming from that penstock.

Q. The penstock of what?

A. Of the Alaska Juneau Company.

Q. Where was that located with reference to your property? A. Directly above it, on the hill.

Q. How much water was coming down then?

A. I wouldn't say how much water—there was quite a big body of water.

Q. How long was it after you heard the crash until you were up on top of the roof there and saw this water coming out of the penstock? [171]

A. It couldn't have been more than two or three minutes—we were walking pretty fast.

Q. Describe the material that came into your store, and to the back of your store?

(Testimony of Isadore Goldstein.)

A. It was muck, water, mud, rocks,—well, there was everything came through there—everything you could think of—there was a piece of a stove came, stove-pipes, and everything you could think of, was coming right through the place.

Q. And mud and debris and rocks?

A. And mud, debris, rocks and water.

Q. Where did this material come from?

A. From right off up the top of the hill there.

Q. Were you on top of the roof before the fire department got there? A. I was.

Q. After you got up on the roof there what did you do?

A. We tried to help get this blacksmith out, that was jammed in between the two buildings—he was the man that was hollering there—he was jammed in between the two buildings. We worked on him until the fire department got there; and the firemen were all climbing up around there, and I said, “I better go down and see what I can do with my own joint now,” and I started back to my own place.

Q. Do you know how long this water kept on running?

A. I imagine it was half an hour, maybe a little longer than that, before it stopped coming through my store.

Q. Do you know how it happened to stop?

A. I don't know how it happened to stop. I was told they shut it off up above—I didn't see them do it.

(Testimony of Isadore Goldstein.)

Q. You are the owner of several lots there, Mr. Goldstein? A. I was.

Q. I think it is admitted that you were the owner of lots 1, 2 and 4, in block M.

A. I was. [172]

Q. In the town of Juneau? A. Yes, sir.

Q. Were these lots improved? A. They were.

Q. How were they located with reference to each other?

A. Two of the lots run directly up the hill for 200 feet from Front Street, up to Gastineau Avenue—directly up the hill. The lot up on the hill was 50x100, and the one on the lower end was 36x100.

Q. How long had you been in the occupancy of these lots?

A. Since 1886—that is, one of the lots—that is where the store building is.

Q. How had these lots been improved?

A. Where the store building is, there is a two-story building 36 by 50—2 stories high; and then there was a big shed in the back of that; and directly back of that was an apartment house 48 feet square, two stories.

Q. Have you made a list so that you would be able to tell the Court and jury the value of these different pieces of property?

A. I have, as near as I can judge the value of them.

Q. Have you got that statement with you?

A. I have.

(Testimony of Isadore Goldstein.)

Q. You may use that in describing the different values.

A. You mean the value of the property or the value of the damages? I estimated the value of the damage done to the property.

Q. Give us the estimated damage.

A. The damage I consider done to the store building was \$1500.00.

Q. How did you arrive at that figure?

A. I estimated that value on it.

Q. What did you base that estimate on?

A. What it costs to do work at the present time, or did at the time of the slide.

Q. Have you made inquiries as to what it would cost?

A. I have made inquiries of different carpenters.

[173]

Q. Go ahead.

A. The damage to the stock in the store was \$2500.00.

Q. To the stock?

A. Yes, by water and mud—that was damage to the stock.

Q. How did you arrive at that figure?

A. Why, the amount of goods that was damaged and was lost, at the price goods was worth at that time.

Q. Go ahead.

A. Warehouse damages \$1500.00. I had to rebuild that.

(Testimony of Isadore Goldstein.)

Q. How much did it cost to rebuild it?

A. It cost me,—Well, it isn't finished yet. I have spent about \$700 on it so far, but it is just about half completed—haven't been able to finish it up.

Q. Go ahead.

A. The apartment house on the hill at \$8500.00.

Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I have had estimates from carpenters, what it would cost to rebuild that property; and there was fixtures in the apartment house, \$2000.00—there were four 5 room apartments. Three rows of cabins, \$3000; and damage to building on lot 2, block M—that is the building which the Russell gun store is in, which I own—figure it would cost \$1000 to rebuild that; and then damage to the lots on the hill \$1500.00.

Q. What is that real estate worth now?

A. It is worth,—well, I don't know—they are taxing me a hundred dollars for the lots at the present time—that is what the last assessment was.

Q. How much was the last assessment before the slide?

A. \$1500.00; and they assessed me a hundred dollars for the lots where the apartment house was.

Q. That is the city assessor?

A. The city assessor, yes, sir.

Q. What else did you lose at that time, Mr. Goldstein? [174] A. Well, I don't know.

(Testimony of Isadore Goldstein.)

Q. Have you given a complete list now of the items?

A. Outside of the furniture and fixtures in the apartment house—I had to itemize those.

Q. What was the furniture and fixtures worth?

A. The way I have it itemized, general merchandise in the store, consisting of boots, groceries, shoes and clothing, \$1500.00; groceries in the warehouse, consisting of rice, bacon, hams, flour, beans, etc., \$1000.00; furniture and fixtures in apartment house, 4 stoves at \$25.00, \$100.00; 4 kitchen ranges at \$100.00, \$400.00; 10 rugs at \$25.00, \$250.00; 4 beds with springs and mattress at \$40.00, \$160.00; 4 tables at \$25.00, \$100.00; 4 dressers at \$30.00, \$120.00; 20 chairs at \$5.00, \$100.00; 8 sets light fixtures at \$10.00, \$80.00; kitchen utensils consisting of pots, pans and dishes, \$230.00; 4 sets linoleum at \$25.00, \$100.00; 4 bathtubs at \$35.00, \$140.00; 4 sinks at \$15.00, \$60.00; 4 wash-bowls at \$15.00, \$60.00; 4 toilets at \$25.00, \$100.00.

Q. Makes a total of how much?

A. \$21,500.00.

Q. Is that a fair estimate and valuation of the property which you lost at that time?

A. I consider it fair, yes. I don't think it could be duplicated for any less than that.

Q. You say this property had been occupied since when?

A. The store building had been occupied since 1886—that is, the premises; the other had been

(Testimony of Isadore Goldstein.)

occupied since 1913, I think that was the time it was built.

Q. Now, this place where you were living, I want to ask you if any of the adjoining property around the neighborhood had been occupied and improved any prior to the slide?

A. It sure had—the entire Front Street had been occupied for years back, as far as I can remember.

Q. How far back can you remember?

A. About 30 years. [175]

Q. What damaged this property that you have enumerated here?

A. The landslide back of the buildings, coming from the top of the hill there.

Q. When did this happen?

A. January 2, 1920.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Goldstein, I think you stated before the store building which is there now,—that isn't the building that was there in 1886? A. No, sir.

Q. It is a new building?

A. It is on the same lot.

Q. You had a store building there back in the early days and occupied it? A. Yes, sir.

Q. And the property behind that, you put your improvements on in 1913, didn't you?

A. Either 1912 or 1913, I wouldn't say for certain.

(Testimony of Isadore Goldstein.)

Q. About that time? A. Yes.

Q. And the valuation that the city placed upon that was \$1300.00, you say?

A. No, I think it was \$1500.00, on that lot.

Q. That is when the buildings were on it?

A. No, sir, the lot.

Q. On the lot? A. On the lot.

Q. The buildings were on the ground the year before the slide, weren't they? A. Yes.

Q. What was the valuation of the lot at that time? [176] A. The assessed valuation?

Q. Yes.

A. I wouldn't say for certain—I don't remember what that was.

Q. Approximately?

A. I don't remember what it was,—I would have to look up the records to see.

Q. You don't mean to say the lot was assessed at \$1500.00? A. It was valued at \$1500.00.

Q. It was not assessed at that? A. No.

Q. The comparison you have there now is the assessment that was made when the buildings were upon the lot? A. Yes, sir.

Q. And it was assessed at \$100.00 after the slide?

A. The bare lot was assessed at \$100.00.

Q. And when the buildings were there it was assessed at \$1500.00 for the lot? A. For the lot?

Q. Yes. A. No, sir, it was not.

Q. Was the value of the house assessed separately? A. No, sir.

Q. Well, how did they separate the value of the

(Testimony of Isadore Goldstein.)

house and the value of the lot?

A. He asked me what was the value of the lot and I told him, and then they put the value of the house and lot together.

Q. How much was that, do you remember?

A. I think it was \$4500 or \$5000 that was assessed at—I wouldn't say for certain.

Q. Did that include the store building?

A. No, sir.

Q. That was the property behind the store?

A. That was the apartment house.

Q. The store building was a separate proposition? [177] A. Yes, sir.

Q. The apartment house and the cabins were all on the same lot, weren't they?

A. No, they were not on that same lot.

Q. Weren't they on that same assessment?

A. No, sir.

Q. How much were the cabins assessed at?

A. I wouldn't say for certain—I think it was a thousand dollars but I wouldn't say for certain until I looked it up.

Q. How much was the store assessed at?

A. The building and the lot I think is \$5000.00.

Q. The items of damaged stock you had in there, do you remember what particular articles of merchandise were damaged? In the store,— not in the warehouse, now, but in the store.

A. I wouldn't say the particular items, no.

Q. Did you make a list of those things that were damaged, at that time? A. I did not.

(Testimony of Isadore Goldstein.)

Q. And your estimate as to what the damage was is a mere estimate? A. A mere estimate.

Q. You wouldn't be able to tell us now what that estimate consisted of—that is to say, what the articles were that were damaged? A. No.

Q. You don't know whether it was tins or bulk?

A. I know it was all included in that. I don't know just the particular stuff I lost there—I don't know the articles—I know some of them, but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment \$1500.00?

A. I don't know whether it was \$1500—I read it off the list here.

Q. \$1500.00 is my recollection.

A. \$2500.00. [178]

Q. That \$2500.00, is that damage to the stock in the store? A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done. I wouldn't come here on oath and testify how much damage was done because there is no way of figuring it up, because that stuff was going right out of the front door on to the beach, and I didn't stand there in the door and check it up as it went out of the store.

Q. You don't know what it was that went out at that time? A. I do not, no, sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

(Testimony of Isadore Goldstein.)

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it—is that right? A. I would not.

Q. And that is true of the other things you have spoken of? A. It is.

Q. The stuff in the warehouse, you don't know just what that was?

A. I couldn't get into my warehouse for 2 weeks because the buildings were laying right on top of it.

Q. There was no way of getting at it, and you only estimated it? A. Only estimated it.

Q. There was no way of telling except by giving your best judgment upon it? A. Yes.

Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you say it did, or that you estimate it was worth at the time of the slide?

A. I estimate it was worth that at the time of the slide.

Q. It cost you less than that, didn't it?

A. I don't know whether it did or not,—I don't know what I did pay for it.

Q. The buildings, how much did they cost you? [179]

A. I don't remember what that was either, but I know the apartment house cost me about \$8000.00.

Q. And as to the rest of the buildings, you don't know? A. I don't know.

Q. When was the apartment house built?

A. 1913, I think it was,— 1913 or '14.

(Testimony of Isadore Goldstein.)

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all the time?

A. Not all the time,—they were moving in and out of them all the time.

Q. Had been used as a building for rent?

A. Yes, sir.

Q. That included the plumbing and the plumbing fixtures, and everything like that? A. Yes, sir.

Q. That took the plumbing fixtures in?

A. Yes, that is the plumbing fixtures,—

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and stuff like that? A. Yes.

Q. When you built the new store, Mr. Goldstein, I think you have already testified in the other case that you made a cut behind the store?

A. Yes, sir.

Q. Of considerable depth? A. Yes, sir.

Q. And you had a slide there that shoved the store out into the street—isn't that right?

A. Yes, sir.

Q. That was before you had a bulkhead put in?

A. No, the slide happened after I put the bulkhead in. I put one bulkhead in and it went out with it.

Q. The bulkhead was not strong enough to hold it? A. No, sir. [180]

Q. And then you put in a stronger bulkhead?

A. I put in piles, and I have had no further trouble with it.

Q. The store building is working forward more

(Testimony of Isadore Goldstein.)

or less, Mr. Goldstein, isn't it? A. No, sir.

Q. Hadn't it been doing that for some time?

A. No, sir.

Q. I am mistaken about that?

A. I think you are; yes.

Q. Haven't you got in braces so as to keep it from sliding? A. I haven't, no, sir.

Mr. HELLENTHAL.—All right, that is all.

Redirect Examination.

(By Mr. RODEN.)

Q. You say you had a little slide back of your building there? A. I did.

Q. When was that?

A. When I was putting up the building.

Q. How did it happen?

A. I had three streams of water out in the back there trying to sluice off a lot of clay off of the bedrock, and I and three other men were out there with three streams of water—firehose—sluicing off the dirt, and it slipped off the bedrock—we were pouring a great amount of water on to the bedrock, and it slipped down in the back of the building there and all three of us almost were killed at the time.

Q. Where did this dirt come from at the time, that slid in?

A. Come off of the bedrock right back of the store,—20 or 30 feet, I would say, back of the store.

Q. That was moved by three streams of water?

A. Yes, sir; we were trying to move it, and it

(Testimony of Isadore Goldstein.)

came down faster than we thought it would come, that's all.

Q. You say there was a man with you in the store at that time? A. Yes. [181]

Q. Who was the man? A. Louie Long.

Mr. RODEN.—That is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. When you put those three streams of water, Mr. Goldstein, there, I understand you to say that was in the bedrock—

A. We were washing the clay off of the bedrock.

Q. And the ground lying above the bedrock slipped down?

A. The ground that was on the bedrock came off.

Q. And you were working three nozzles at one time on the clay—on the bedrock?

A. We were working on the clay on top of bedrock.

Q. And that caused the ground to slip on the bedrock? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) And the ground began to slip right where you began to cut out?

A. The ground began to slip where we began to cut and everything on top came on over.

Mr. RODEN.—That is all.

(Witness excused.) [182]

Testimony of Lewis Long, for Plaintiff.

LEWIS LONG, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Lewis Long.

Q. Where do you live? A. Juneau.

Q. What is your business?

A. Oh, I work on boats mostly.

Q. Were you in Juneau on the 2d day of January, 1920? A. Yes, sir.

Q. What were you doing on that day?

A. I wasn't doing anything.

Q. Were you in the store of Mr. Goldstein along about 9 or 10 o'clock? A. Yes.

Q. Did anything unusual happen around about that time?

A. Yes; I was sitting in there talking, and I heard some water in the back of the store there.

Q. What did you do?

A. Izzy said, "Let's go back and see what is the matter"—it started to come in through the door, so we started to dig a hole underneath the floor so as to get the water to go underneath.

Q. How much water was coming, about?

A. I don't know—it was quite a stream.

Q. You were trying to dig a ditch there?

A. So the water would run underneath the floor.

(Testimony of Lewis Long.)

Q. Then what was the next thing that happened?

A. Well, we were digging out there for, I don't know, 10 or 15 minutes,—something like that—and all of a sudden Izzy yelled out, "Come on; let's beat it." We heard a crash, or something, so we started to run out through the store.

Q. Then what happened?

A. We run out on the sidewalk—of course it was all over then. [183]

Q. What was all over? A. The slide.

Q. Where did the slide come from?

A. From the hill.

Q. And came through the store? A. Yes.

Q. What material was carried through the store there?

A. Well, it was gravel, water and mud, and groceries and dry goods and all kinds of things.

Q. Where was this water and mud coming from, and rocks and gravel?

A. From the hill above there.

Q. After you got outside, then what did you do?

A. I heard screaming up on the top there, back of the store, sounded like some person hollering, and I went around, and I think Izzy did too, and we got on the top of Russell's store from the stairway that goes by the store up the hill.

Q. Russell's store is right next to Goldstein's store? A. Yes, Jim Russell's.

Q. And you got on top of the roof there?

A. We got on top of the roof, and on top of all of the rubbish and lumber.

(Testimony of Lewis Long.)

Q. When you got up on top of the roof did you see any water coming from anywhere?

A. I looked to see where this stream was coming from, and I looked up the hill,—I was kind of leary that something else might come down—I looked up the hill and I saw some water spouting out.

Q. Where was this water coming from?

A. From a little shack, or some kind of a narrow thing, it looked to me.

Q. How much water was coming out of there, about?

A. It looked to me about what I would call a good sluice-head.

Q. Where was the water running to?

A. Well, it came down the hill towards this point where the slide started, and it run into some brushes, and I couldn't see [184] it any more until—I saw some water, although it didn't show very much until it got over the place where the slide started,—it spread out more than it did when it got out of that road.

Q. It broke after it left the top of the slide—it spread out? A. It came over the slide.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You were in the store, Mr. Long, just before the slide, were you? A. Yes, sir.

Q. And the water came down just as Izzy has

(Testimony of Lewis Long.)

testified to, in the back door, and you tried to get it to go under the store? A. Yes, sir.

Q. And the slide hit you and you went out of the front door? A. It didn't hit me.

Q. Hit the store, and you went out of the front door? A. Yes, sir.

Q. And then you went out as you testified to?

Q. And within the next half hour you were out there and saw the different things you have stated; is that right?

A. It wasn't half an hour afterwards.

Q. How long afterwards?

A. From the time I turned back to go to the store until I got up on top of the buildings couldn't be more than three or four minutes.

Q. The main idea was to get this woman out?

A. No, I didn't get any woman out—I got the blacksmith out,—they called him—

Q. And after you got him out, then you took a look around, isn't that right? [185]

A. No, I didn't take any look around,—I was busy looking for another fellow.

Q. You were pretty busy for how long?

A. I don't know—it was quite a while—maybe an hour, probably.

Q. You didn't have much time to look around, Mr. Long?

A. No, I looked around just when I got on the roof—that is the time I saw the water.

Q. You took a look up the hill and you saw some

(Testimony of Lewis Long.)

water coming from the penstock and flume?

A. I guess it is the flume, I don't know.

Q. That shed?

A. That shed is where I saw it.

Q. And you saw water where the slide was?

A. Yes.

Q. But that particular water you didn't trace down the hill, did you, to the slide?

A. I saw it come down to some brush, then I didn't see it.

Q. You saw some water on top, and you saw it in the mud where you were standing, that is right, isn't it? A. I wasn't standing in the mud.

Q. The mud was right around the buildings?

A. I was standing on broken up houses.

Q. There was mud immediately behind them, wasn't there?

A. There was no mud on top of the lumber.

Q. Not on top, but around them?

A. Underneath, yes.

Q. You saw the water there and you saw the water up on the side of the mountain where the flume is? A. Yes.

Q. And between those places you don't know where the water was? A. No.

Q. You didn't study that out?

A. No, I didn't study that out.

Q. You don't know where the water ran between the place where it left the flume and where you saw it when it was around the [186] bottom of the buildings—that is right, isn't it?

(Testimony of Lewis Long.)

A. I saw the water before the slide down there at Izzy's store—that is the only time I saw the water, and it was at the back end of the store and we were trying to poke a hole there for it to run under the floor.

Q. That is the only time you really ever saw the water itself? A. That is down there.

Q. Down there, yes; and then you saw it up on the hill after the slide? A. After the slide, yes.

Q. And you took it for granted that that was the water that you saw in the first place—that is right, isn't it? A. I think so, yes.

Q. You didn't stop to watch that hillside and figure out just where that water traveled through the brush, or anything of that kind, did you, Mr. Long? A. No, I did not.

Q. You were busy with other things—getting people out of that wreck?

A. I looked up just when I got on top of this rubbish, when I saw the water coming out of the flume.

Q. Then you got busy getting the blacksmith out of the wreckage, isn't that right? A. Yes, sir.

Q. You don't know where the water went to, only you saw water coming on top of the slide?

A. I don't know whether that was the water that came from the shack or not. I saw water coming to the point where the slide came from.

Q. You don't know where it came from?

A. No,—I couldn't swear it came from the chute or shack.

(Testimony of Lewis Long.)

Q. You didn't notice any water coming down the gulches, did you?

A. No, I didn't see any—I didn't look.

Mr. HELLENTHAL.—That is all. [187]

Redirect Examination.

(By Mr. RODEN.)

Q. Do you know any other place where that water might have come from except out of this little shed that you saw up there?

Mr. HELLENTHAL.—We object to that.

The COURT.—Ask him what he saw and what he knows.

Q. The only place you saw any water come from on top of the hill was out of this little shed?

A. Yes.

Q. And this little shed is at the end of the flume?

A. Yes, I guess it is.

Q. How long did you see that water running out of there, Mr. Long?

A. Well, it was running all the time when I was looking.

Q. How long was that?

A. Two or three minutes, I imagine, after I got on top of the slide.

Q. Then it kept on running for some little time?

A. I suppose it did because when we were digging on the second man we were down in a hole—I dug away a lot of lumber—I guess I was down 5 or 6 feet, and Mr. Forsythe, the patrolman, he was standing on the top of Russell's house watching us,

(Testimony of Lewis Long.)

and he said, "Watch out, boys; come out of there; there is another slide coming," and we looked up out of the hole and there was mud and water just below where the bridge was knocked out, coming pretty fast, but when it got to where we were it spread out and it didn't bother us any.

Q. This second little slide, did you see any water coming from that penstock then?

A. No, I didn't look up.

Q. Do you know how long the water was shut off, after that? A. I do not.

Mr. RODEN.—That is all. [188]

Recross-examination.

(By Mr. HELLENTHAL.)

Q. When this bank broke off, Mr. Long, that is when you saw quite a lot of water coming right over the top of the slide, wasn't it,—right where the slide broke loose, the water was coming over there about that time in quite a big volume—quite a lot of water at that time? A. After the slide?

Q. After the second chunk broke off—after these fellows yelled, "Look out for the slide"?

A. I didn't see no chunk—after Mr. Forsythe yelled, "Look out, boys, there is another slide coming," it was right below the bridge that was washed out,—it was about that high.

Q. At that time there was quite a lot of water and mud coming over the top of the slide where it had broken loose?

A. I didn't look up there that time.

(Testimony of Lewis Long.)

Q. You didn't look up and you don't know?

A. No.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

(Whereupon court adjourned until 2 P. M.)
[189]

AFTERNOON SESSION.

March 24, 1921, 2 P. M.

Testimony of Fred A. Sorri, for Plaintiff.

FRED A. SORRI, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Fred A. Sorri.

Q. You live in Juneau? A. I do.

Q. How long have you lived in Juneau, Mr. Sorri?

A. This has been my home since the spring of 1915.

Q. What is your business?

A. At the present time mail clerk.

Q. Did you know the Koski house which was located in the town of Juneau prior to the slide in January, 1920?

A. The old Koski house—I resided there before the new one was built.

Q. When was that built, Mr. Sorri?

(Testimony of Fred A. Sorri.)

A. As near as I remember, the latter part of April, 1915, and the early part of May.

Q. Did you have anything to do with the building of that house?

A. I was employed there from the time they laid the foundation until they completed painting.

Q. I wish you would describe to the Court and jury how the foundation was put there—what was done in the way of putting in a foundation?

A. Well, in preparing for this first we decided to level the ground out so that the whole house—bottom floor of the house would set level with the surface of the ground, but we found that we couldn't do so on account of the thickness of the surface—that is we ran into the rock bottom, and part of the [190] house—that is, the front end was set up on piles and the back end set up on the dirt, but we mucked down to the solid rock or boulders.

Q. How was the down channel uphill corner placed?

A. On the north side of the building, that is up next to the mountain, the west face of the building at the north end, we cleared out a place for the sidewalk, and then towards the south end of the building—that is, on the southwest corner, we mucked out a space of about 8 feet, I believe, high, and built a stairway.

Q. This cut that was made at the down channel corner, uphill corner, was about 8 feet high?

A. From the base—being vertical, from the base to the top of the cut.

(Testimony of Fred A. Sorri.)

Q. How far did this cut run up this way?

A. The north end of the building?

Q. Yes.

A. Up to about 25 feet, then it sloped off to nothing.

Q. So practically speaking, this corner, the up-channel corner and uphill corner, there was no digging done there at all?

A. Nothing only the exception of clearing a space for the sidewalk, which was about 4 feet wide.

Q. You just leveled that off a little bit?

A. Yes, sir.

Q. There wasn't any digging done?

A. No, sir.

Q. And the cut that was made at this corner ran back you say about 20 or 25 feet?

A. Yes.

Q. And would be about half the length of the building, practically speaking? A. Well, yes.

Q. And the front downhill side, I understand, was on piling?

A. The front, yes, sir.

Mr. RODEN.—You may cross-examine. [191]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You intended first to make the cut deep enough so you could put the whole house on the solid ground, Mr. Sorri?

A. Yes, sir, but we were hindered on account of solid rock.

(Testimony of Fred A. Sorri.)

Q. You made the cut until you got to bedrock and then you had to quit.

A. No; first we dug a hole to find out how far the bedrock would be, and we went about,—at the back end it varied—

Q. Some places was bedrock and some places wasn't, isn't that right?

A. It was all bedrock wherever you went because when we excavated for the place they used for a wash house we couldn't get—they wanted to excavate up to the face of the building, that is up to the mountain-side, but we couldn't on account of rock. There was only half of that used; the other half, that is the front of this washhouse, was about 15 feet wide, and they wanted to use the south end for storage purposes, and they couldn't on account of this rock.

Q. You took out the loose soil in the back until you got to where the rock was, so you couldn't make it any deeper—that is the idea, isn't it?

A. In excavating for the basement?

Q. No, not in excavating for the basement, but right in the back where the cut was the deepest, I mean.

A. There was no excavating done there at all because we couldn't get down to where we wanted to because the rock was too near the surface—that is, the south.

Q. The cut that was already there was as deep as it could go? A. Yes, sir.

Q. And you had no more cutting to do?

(Testimony of Fred A. Sorri.)

A. No more.

Q. That had already been made by Mr. Lund and others that had been there—they made it as deep as it could be made? [192]

A. As deep as it could be made, on the south.

Q. That is the uphill side? A. Yes, sir.

Q. And the cut that was there, made by Mr. Lund and others, wasn't wide enough for the house so you had to extend it down channel way?

A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. And you extended it as far as the line of the lot?

A. Yes, sir—not as far as the line of the lot, no, sir; they built a brick wall about 5 feet beyond, towards the channel, from the face of the building—that is, we constructed a wall there of rock.

Q. That rock wall ran—

A. North, and stood at the foot of the building, about 5 feet from the base of the building, on the channel side.

Q. The first thing you did was to make the excavation wide enough for the house—that is the first thing you did, wasn't it—widen out the excavation there? A. Yes.

Q. And you know where the Bach house is?

A. The Bach house?

Q. Yes. A. No, sir.

Q. The house that they call the Bach house here?

A. No, sir.

Q. That is the house right down channel from the

(Testimony of Fred A. Sorri.)

Koski house—the down-channel side.

A. Larson's house—that is between the Koski house and the channel—the Larson house.

Q. The Larson house is right in front of the Koski house. A. Yes, sir.

Q. The Bach house is the house standing on the side of the Koski [193] house. A. Yes, sir.

Q. You get me now, don't you?

A. Yes, sir.

Q. The excavation you made was towards the Bach house, in that direction, down-channel direction? A. Yes, sir.

Q. And you excavated there until the excavation was in your judgment about 8 feet deep?

A. Eight feet deep.

Q. Now, you didn't build any rock wall there, did you?

A. We built it out at the end of the house. The excavation was just in the southwest corner and it didn't extend out—that is on the south end of the house, the southern face of the house didn't come more than 8 feet—that is, it didn't project towards the channel more than 8 feet.

Q. That is 8 feet, you mean, from where the back of the cut was to where the slope of the hill was?

A. No; from the southwest corner of the hill.

Q. You mean the southeast corner, don't you?

A. Southeast, correct.

Q. From the southeast corner of the house?

A. Yes.

(Testimony of Fred A. Sorri.)

Q. The excavation would extend horizontally about how many feet, did you say?

A. Eight feet towards the channel.

Q. Then you had to cut behind that a space of about 4 feet more for a sidewalk, didn't you?

A. Yes, sir.

Q. So that made about 12 feet it extended from the edge of the excavation to the edge of the mountain as it originally was?

A. Approximately, yes, sir.

Q. Horizontally, I mean? A. Yes, sir. [194]

Q. And vertically the cut was about how much?

A. Approximately 8 feet—not more than that.

Q. That is your best recollection?

A. Yes, sir.

Q. You didn't measure it at the time?

A. I could judge it by my height and the height of the cut—it extended—

Q. That is your best recollection of it?

A. Yes, sir.

Q. The rock wall you built was built along the side of the back of the house, wasn't it?

A. Yes, sir, it was built there.

Q. It wasn't in the back or behind the house?

A. No, sir.

Q. There was no wall behind the house at all?

A. Not in the surface where it could be seen from the outside; no, sir.

Q. The wall that you built—what I mean now, Mr. Sorri, so as to get it straight, you made a cut that was about 25 feet lengthwise, running from the

(Testimony of Fred A. Sorri.)

corner where the Bach house was, on that side, down to where it met the gulch, isn't that right?

A. Not to where it met the gulch. The gulch extends about the north end of the house, and we would have had to cut out about 10 or 15 feet more. The cut only projected about 25 feet—that is, from that corner towards the north, and dipped off to where we didn't do any excavating, only the clearing of the space for the sidewalk.

Q. The foundation of the house was right on the level of the gulch, wasn't it, or about the level of the gulch? A. About, approximately, yes, sir.

Q. It might have been an inch or so off, but as near as a man could see it was right on the level of the gulch, the foundation of the house—that is right, isn't it? A. Yes, sir. [195]

Q. On the other side, toward the Bach house, there was a cut, to your recollection now, of about 8 feet deep? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. Now, the distance between that corner and the gulch was 25 or 30 feet, wasn't it?

A. More than that—all of 60 feet from the bottom of the gulch.

Q. Sixty feet would you think?

A. From the bottom of the gulch, yes, sir.

Q. The lot was only 50 feet wide, wasn't it? I don't understand you, Mr. Sorri, exactly, or you don't understand me. I am speaking of the distance across the lot, along the side of the mountain—do you understand me now? A. Yes, sir.

(Testimony of Fred A. Sorri.)

Q. The gulch came right down the mountain-side?

A. Yes, sir.

Q. The ridge came right down the mountain-side, too? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. Now the house ran about 45 feet along with the mountain—that is right, isn't it?

A. Yes, sir.

Q. Now, the excavation that was made wasn't the entire length of the house, was it?

A. No, sir.

Q. Because the gulch ran into the corner of the house?

A. Yes, sir; the bottom part of the gulch.

Q. And at that side the house stood on a level with the gulch, that is right?

A. It did, sir, only there was a slope.

Q. Then the excavation started from the gulch and ran this way, as I point my finger, towards the Bach house, didn't it? [196]

A. It did from about the middle of the building, yes, sir.

Q. From the north or gulch way?

A. Yes, sir.

Q. There was no excavation right where the gulch was? A. No, sir.

Q. And it kept getting bigger as it got toward the Bach house? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. On that side you built no wall?

A. No, sir.

(Testimony of Fred A. Sorri.)

Q. Built no wall at all? A. No, sir.

Q. The wall you built was in the front of the house?

A. Yes, sir; just a small wall to keep the dirt from sliding.

Q. And it was in front of the house?

A. Yes, sir.

Q. Not any in the back of the house?

A. Not on the back. In the basement we put boards up there, 2 by 12's.

Q. There was a sidewalk built on the back of the house? A. Yes, sir.

Q. And the bank sloped up from the sidewalk?

A. Yes, sir.

Q. Where you made the cut you didn't make it right straight up but it sloped back a little?

A. Yes, sir.

Q. And sloped right down to the edge of that sidewalk, isn't that right? A. Yes, sir.

Mr. HELLENTHAL.—That is all. [197]

Redirect Examination.

(By Mr. RODEN.)

Q. Let me understand this clearly,—there seems to be some confusion. Supposing this is the Koski house, this is down channel, and this is the hill. I understand you to say that you made a cut here which at its deepest place was about 8 feet?

A. Yes, sir.

Q. Then this cut tapered out this way and got less and less until about 25 feet from here—

(Testimony of Fred A. Sorri.)

A. It disappeared altogether.

Q. It disappeared altogether, and the house here was standing on the level, and the gulch comes down here—somewhere in here?

A. Right in there, yes, sir.

Q. The gulch doesn't come to the Koski house at all?

A. The bottom of the gulch extends about 10 feet further north from the face of the house.

Q. Say about in here?

A. That is the bottom of the gulch.

Q. Have you seen any similar cuts around town here, Mr. Sorri? A. Not to my recollection.

Mr. HELLENTHAL.—I object to that.

Mr. RODEN.—That is all.

(Witness excused.) [198]

Testimony of N. G. Nelson, for Plaintiff.

N. G. NELSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. N. G. Nelson.

Q. What is your business? A. Merchant.

Q. How long have you been in the town of Juneau? A. Since the fall of 1913.

Q. How long have you been engaged in the mercantile business? A. Since that time.

(Testimony of N. G. Nelson.)

Q. What business were you engaged in prior to that time? A. Mining.

Q. Where did you mine?

A. In the interior—Fairbanks.

Q. What kind of mining did you follow there, quartz mining or placer mining?

A. Well, placer mining.

Q. Where do you live at the present time, Mr. Nelson?

A. Upstairs over my store, on Front Street.

Q. Where is your store located with reference to the Goldstein building on Front Street?

A. Well, it is about a block up this way—I don't know exactly.

Q. It is north?

A. It is north about a block, I should judge.

Q. Your property is about a block north from the Goldstein building, and on the opposite side of the street? A. Yes, opposite side of the street.

Q. How long have you lived in this particular place, Mr. Nelson?

A. I have made it our residence since October three years ago—no, two years ago last October, since I moved there.

Q. Did you reside in this place on January 2d, 1920? [199] A. Yes, sir.

Q. And you had been residing there continuously for quite a considerable period of time prior to that time? A. I had.

Q. Are you familiar with the location of the Alaska Juneau Gold Mining Company's flume and

(Testimony of N. G. Nelson.)

penstock on the sidehill of Mount Roberts?

A. No, I cannot say I am familiar with the flume.

Q. Well, do you know where it is located?

A. Yes, sir.

Q. On the 2d day of January, 1920, did you see any water coming out of this flume—that is, before the slide?

A. Why, I seen some water coming out of—I don't know whether it was out of the flume. I always, as I told my wife,—there was a salt water project or something like that—that is the only way I know—

Q. Did you see any water up there on the 2d day of January? A. Yes, sir.

Q. Before or after the slide? A. Before.

Q. Before the slide,—about how long before the slide?

A. Well, before I went down to the store in the morning.

Q. About what time in the morning would you say that would be?

A. Be about half-past eight, I guess.

Q. I show you Plaintiff's Exhibit "N," and ask you where you saw the water coming out of the works up there about the time you speak of?

A. Well, you cannot see it very well from here,—it was in here somewheres it come.

Q. Show that to the jury, please

A. Of course from my place you can see it

(Testimony of N. G. Nelson.)

better, but it is in here—all along here, and in back here.

Q. You saw this water coming out of there about half-past eight in the morning? [200]

A. No, I wouldn't say especially what time. I may have went down to the store at 9 o'clock, or something like that—I couldn't say.

Q. But anyhow, you know about when the slide happened, don't you? A. Yes.

Q. About how long before the slide occurred had you seen this water coming out of there?

A. Well, I seen it that morning, anyway. I couldn't say if I was upstairs an hour before or half an hour before.

Q. Could you say that you saw it at least half an hour before? A. No, I could not.

Q. You are positive you saw the water coming out of there, though?

A. Well, it was called to my attention that morning.

Q. How was it called to your attention?

A. Well, it was called to my attention this way, that Sunday the Missus watched the hillside, and she was watching the hillside every day since we were in the wreck, and we were in that wreck down below there, and she said, "That flume is going to bust." That was Sunday. I said, "That is no flume—that is the salt-water system."

Q. We do not care for the conversation.

A. That is the way the conversation came up,

(Testimony of N. G. Nelson.)

and she was watching that all the time, and that morning it still continued to run hard, and that morning before I went down I looked up on that hillside.

Q. How much water was coming down the hill at that time?

A. The same amount of water as you see in a sluice-head, at that distance—maybe four or five, for all I know.

Q. You cannot say how much?

A. No, I cannot.

Q. Was it a fair-sized stream? A. Yes.

Q. Can you give us an idea how large it would be?

A. It was a round spout that comes out of a ditch, —of course, [201] it is quite a distance from our house up there.

Q. Could you see that spout?

A. Oh, yes, you can see the water.

The COURT.—What did the witness say, that he could see that spout, or that he could not see that spout—what was his answer?

Mr. RODEN.—He said he could see the water.

The COURT.—Yes, he said he could see the water. What is your answer—did you see the spout or did you not see the spout?

Mr. RODEN.—He hasn't said yet.

The COURT.—What do you mean—did you see the spout?

The WITNESS.—I didn't see no spout.

(Testimony of N. G. Nelson.)

Q. You didn't see any spout but you saw the water?

A. A sluice-head of water was coming out of there.

Q. At the time of the slide, Mr. Nelson, where were you? A. I was in the store.

Q. Did you leave the store or go anywhere to observe what had happened? A. I did.

Q. What did you do?

A. I ordered the Missus to take the baby and walk up the hill, and she walked up here somewhere; and I went down to Goldstein's place and there was quite a crowd there, and I went back to the store and opened up and went upstairs and watched things from the top of the roof.

Q. Did you again then look up there in that direction where you had seen this water?

A. I did.

Q. What did you see?

A. I seen the water was shut off there about half an hour or so after.

Q. Where was this water coming from with reference to the place where the water you saw before the slide was coming from?

A. It was coming from the same place as I showed you there on the picture. [202]

Q. Where was this water going to after it came out of there?

A. Along the place where the slide was.

Q. Did you see it go over there?

(Testimony of N. G. Nelson.)

A. Yes, sir.

Q. Now, had you seen this water come out of this same place at any time prior to this particular day?

A. It had been called to my attention, but I wouldn't say that I have seen it, no.

Q. You don't know whether you have seen it or not? A. No, I would not particularly say.

Q. Did you see it the day before?

A. I did.

Q. It was coming from the same place then?

A. Yes.

Q. Do you know whether you saw it two days before? A. I couldn't say.

Q. You are positive you saw it coming out of that same place the day before the slide?

A. I am positive it come out of there Sunday.

Q. That was the Sunday before the slide?

A. Yes, that was the Sunday before the slide.

Q. Do you know what day of the week it was when the slide happened? A. Monday.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You saw the water coming from the same place Sunday that it came from on Monday?

A. Yes, sir.

Q. Now, what time Sunday was it that you saw it?

A. Well, it was running—we are never out, so

(Testimony of N. G. Nelson.)

I couldn't say. The Missus was sitting in that window watching that water all the time on the hillside, and if there is anything [203] that looks suspicious, the first thing she asks me if we better move out, or something, so I wouldn't say what time it was.

Q. You don't remember what time Sunday it was? A. No, sir.

Q. Whether it was morning, noon or night?

A. No, sir.

Q. You saw it again Monday forenoon?

A. Yes, sir.

Q. Do you know what time Monday forenoon it was? A. Early in the morning.

Q. Early in the morning?

A. The first part of the morning, before I went down to the store.

Q. When you first went to the store?

A. Before I went down to the store.

Q. What time did you open the store usually?

A. Oh, around half-past eight or nine o'clock.

Q. Then it was some time before half-past eight that you saw it that morning?

A. Before half-past eight or nine, yes.

Q. That morning it was raining hard, wasn't it?

A. I believe it was raining hard for four or five days.

Q. That is your recollection,—it was raining hard on Sunday, the day before the slide, wasn't it?

A. I guess it was.

(Testimony of N. G. Nelson.)

Q. You are not sure about that, but that is your recollection any way?

A. That is my recollection.

Q. How wide was the stream that you saw; apparently how wide?

A. Like you see a good sluice-head of water in the distance coming out of a box, if you are used to seeing those things—I have no idea at all.

Q. It would be maybe 3 feet wide?

A. Well, when you say a sluice-head of water, it wouldn't be [204] that wide if it was compact.

Q. The water was coming right down the hill, wasn't it? A. It was shooting right down, yes.

Q. Right out from the mountain?

A. Right out from some sort of a house or something up there, it was coming out of.

Q. It was shooting out and coming right down the hill? A. Yes.

Q. So you could see it plain? A. Yes.

Q. It shot out a little ways, didn't it?

A. It shot out a little ways.

Q. And it shot out down the hill? A. Yes, sir.

Q. Away from the hill, the stream was running?

A. Of course it was shot out, but I don't know how far away from the hill.

Q. But I mean the spout was running away from the hill—down the hill—it was shooting?

A. Yes, sir.

Q. You cannot remember how wide the stream was? A. No, sir.

(Testimony of N. G. Nelson.)

Q. But it was shooting right out towards Front Street? A. Yes, sir.

Q. How far was it falling from where it came out until it hit the ground?

A. Impossible for me to state because I wasn't there—I just seen this from a distance—I wouldn't say.

Q. Would you say 50, 60 or 75 feet?

A. I wouldn't say—I would know if I had been up there.

Q. I am asking you about how far it fell before it hit the ground?

A. I couldn't say—I wouldn't state—maybe hundreds of feet for all I know—that mountain may be straight up and down. [205]

Q. Anyhow it was going quite a long ways—it was shooting out quite a long ways before it hit the ground?

A. It might have shot there 6 or 10 feet, or 50 feet, if you can draw any conclusion from that—I don't know.

Q. You don't know anything about that?

A. No, I don't.

Q. How many streams did you see coming out at that time,—one or more?

A. Well, there is only one body of water there that come out.

Q. There was only one body that came out?

A. That came out there.

Q. You are sure of that? A. I am sure of that.

Q. That there wasn't more than one stream com-

(Testimony of N. G. Nelson.)

ing out from the level of the flume?

A. I am certain of that.

Q. And that is the same stream you saw?

A. That is the same stream I saw.

Q. That is the same stream you saw on January 1st? A. Yes.

Q. The day before the slide?

A. That is the same stream.

Q. At the same place? A. At the same place.

Q. Where was that with reference to the mouth of the tunnel—do you know where the mouth of the tunnel is there?

A. It appears from our place the tunnel is over a little on that side, and this in here is set a little over on this side,—it may be that the tunnel runs directly into this place—I don't know—I couldn't say.

Q. Did it look that way to you from where you were?

A. It looked like the tunnel is in close neighborhood there.

Q. It looks like the tunnel is right close to it?

A. Yes.

Q. That is the way you saw it? [206]

A. Yes.

Q. You couldn't see the spout, you said?

A. You couldn't see if there is a big iron pipe or a wooden flume or anything else.

Q. You couldn't see that?

A. No, you couldn't see that.

Q. All that you could see was that there was a

(Testimony of N. G. Nelson.)

body of water spouting out?

A. It was spouting out.

Q. It was coming away from the mountain?

A. I couldn't say it was coming away from the mountain—it was coming down the mountain.

Q. And it was coming down towards Front Street? A. Yes.

Q. And you don't know what happened to it after that? A. I do not.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. When you spoke about a sluice-head, Mr. Nelson, what did you mean?

A. A sluice-head of water?

Q. Yes.

A. In the interior you have got to have a sluice-head of water, or two or three of them, to do any amount of work.

Q. What size box do you use in there for carrying a sluice-head of water?

A. We generally used to have—in the early days we had 12-inch boxes.

Q. What pitch—what grade?

A. Well, that all depended on the work, sometimes—how large dirt you are handling.

Q. But when you talk about a sluice-head, when you say a [207] sluice-head of water runs through the boxes—

A. There is a considerable body of water—I couldn't tell you by inches.

(Testimony of N. G. Nelson.)

Q. You don't know what the grade of it would be for ordinary medium size gold, what grade you would give the boxes?

A. In some places we might give it,—well, I wouldn't state.

Q. Ten inches would be about the average, wouldn't it?

A. No, that would be pretty much, I think, for single boxes.

Q. For medium fine gold?

A. Yes; just depends on how big dirt you have to work and what water you have.

Q. I mean on an average.

A. Of course I never did rig up any sluice boxes.

Mr. RODEN.—All right—that is all.

(Witness excused.) [208]

Testimony of John Jackson, for Plaintiff.

JOHN JACKSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. John Jackson.

Q. What is your business? A. Fisherman.

Q. How long have you been making Juneau your headquarters, Mr. Jackson?

A. Since the spring of 1914.

Q. Were you in Juneau on the day on which the slide occurred about which we are talking here?

(Testimony of John Jackson.)

A. Yes.

Q. What were you doing in the morning of that day?

A. Why, I went down the street, down to the City Float to look after the boat.

Q. About what time in the morning did you go down there?

A. Well, it was,—as close as I can remember, it was between 8 and 9 o'clock in the morning.

Q. At that time you passed the soda works down there and the Goldstein building? A. Yes.

Q. Did you then have occasion to look up on the mountain-side? A. Yes.

Q. In the direction of the Alaska Juneau flume and works up there? A. Yes.

Q. What did you see up there?

A. I saw a stream of water running down the hill-side.

Q. Where was this stream of water coming from?

A. Why, it looked like it came out of the flume, as far as I could see.

Q. What place in that flume was that coming from? . [209]

A. Just on the north side of the end of the tunnel.

Q. Just on the north side of the end of the tunnel? A. The way it looked to me.

Q. I show you Plaintiff's Exhibit "N" and ask you if you can about show where this water was coming from?

A. It looked like it came out right there, or somewhere around there.

(Testimony of John Jackson.)

Q. Show that place to the jury. Now, where was this water running to?

A. Why, it disappeared in the brush downhill there; that is the last I know of it.

Q. Now, where were you at the time of the slide?

A. I was back up to the New York Exchange.

Q. The New York Exchange? A. Yes.

Q. Did you walk down towards the slide after you heard about it? A. Yes.

Q. About how long would you say it was after the slide happened that you got down there again?

A. It couldn't have been over 10—5 or 10 minutes, because I went down as soon as I heard the fire-alarm,—we all went down there.

Q. I suppose you walked as fast as you could to get down there? A. Yes.

Q. Did you then see any water? A. Yes.

Q. Where was this water coming from?

A. The same place I saw it the first time.

Q. This time did you see any water running over the slide, where the slide had come down?

A. Yes.

Mr. RODEN.—You may cross-examine. [210]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. About 8 o'clock in the morning you say you saw the water coming from the flume there?

A. Yes, between 8 and 9.

Q. At that time how much water was there coming down, Mr. Jackson?

(Testimony of John Jackson.)

A. Well, there was quite a big stream of water—I couldn't say exactly.

Q. How wide was it? A. Well—

Q. I mean as near as you—

A. I should judge 5 or 6 feet, the way it looked to me.

Q. About five or six feet wide?

A. Something like that.

Q. You couldn't say exactly, but that is your best judgment? A. Yes.

Q. It was a thick stream but you couldn't tell how thick it was, of course? A. No.

Q. Because you were looking right into it?

A. Yes.

Q. The stream was coming right towards you so you couldn't tell how thick it was, but you could tell the width of it? A. Yes.

Q. That is right, isn't it? A. That is right.

Q. And it was between 4 and 5 feet wide?

A. Yes.

Q. That was between 8 and 9 o'clock in the morning? A. Yes.

Q. You saw the water there after the slide?

A. Yes.

Q. And there was about the same amount of water then, wasn't there?

A. About the same amount. [211]

Q. That water as it came down, about how far did it fall before it hit the ground?

A. I couldn't say just how far.

Q. 50 or 60 or 100 feet? A. No.

(Testimony of John Jackson.)

Q. Not quite that far?

A. It didn't seem to be that high, no.

Q. About how high would you think?

A. I judge 15 or 20 feet—I couldn't say, though, for sure, but something like that.

Q. It was maybe not as much as 50 feet and more than 10 or 15? A. Yes.

Q. Somewhere between 10 and 15 and 50 feet would be about it, do you think?

A. Around 10 or 15, something like that—I couldn't say for sure.

Q. You didn't notice that particularly, I suppose? A. No.

Q. Now, the place where the water came from was right at the tunnel, where the tunnel comes out—right north of the tunnel, you said?

A. The way it looked to me it was a little north of the mouth of the tunnel.

Q. About how many feet?

A. That I couldn't say—that is pretty hard to say.

Q. A witness said it was about 15 feet—would that be about correct?

A. Well, I really couldn't say just how many feet.

Q. But it was in that neighborhood?

A. It was a little north of the mouth of the tunnel.

Q. In the neighborhood probably of 10, 15 or 20 feet? A. Probably.

Q. Somewhere around there—of course you couldn't tell exactly from a distance how many feet,

(Testimony of John Jackson.)

I know that, but in that neighborhood? [212]

A. Yes.

Q. That is right, isn't it? A. That is right.

Q. And you only saw one stream, didn't you?
There was only one stream of water coming down?

A. There was only one stream of water coming down, yes.

Q. You didn't see any more streams? A. No.
Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Martin Holst, for Plaintiff.

MARTIN HOLST, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is Martin Holst?

A. Yes, sir; Martin Holst.

Q. Where do you live, Mr. Holst? A. Juneau.

Q. How long have you lived in the town of Juneau? A. 24 years.

Q. What is your business? A. Fishing.

Q. Were you in the town of Juneau on the 2d day of January, 1920? A. Yes.

Q. That is the day that the slide occurred?

A. Yes.

Q. What were you doing the morning of that day?

A. I was home, and I was going down to the boat

(Testimony of Martin Holst.)

—I had a boat laying at the side of the City Dock, and after breakfast I went down there—somewhere around 9 or 10 o'clock. [213]

Q. And you passed at the foot of the hill on which this slide later on occurred?

A. I passed along Front Street; yes.

Q. Did you have occasion to look up on the side-hill, in the direction of the flume and penstock of the Alaska Juneau Company?

A. Yes, I did—I looked up there.

Q. What did you see up there?

A. I saw a big stream of water coming out close to the tunnel there, where the tunnel goes into the mountain.

Q. Where was that stream going to?

A. That come right out and fell down the hill probably 40 or 50 or 60 feet and struck the ground in that brush below there, right by a big spruce tree there.

Q. Where were you at the time the slide happened?

A. I was going home again. I was down on the old Pacific Coast dock, down there.

Q. Did you turn back when you heard it?

A. I turned right back.

Q. Did you see any water coming out at that time? A. Yes.

Q. Where was this water coming from?

A. The same place.

Q. Did you see any water running over the face of the slide at that time? A. I did.

(Testimony of Martin Holst.)

Q. How much water was there, about?

A. There was the same kind of a stream—about 4 or 5 foot stream across, the way it looked.

Q. That was hitting right in the place of the slide? A. Yes.

Mr. RODEN.—You may cross-examine. [214]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. How long after the slide would you say it was that that water was running over the face of the slide?

A. About 5 minutes, I think, because it took me about 5 minutes to go from the Pacific Coast dock to the store—it didn't take me any longer. When I heard the crash I knew what happened, and so I ran up in the neighborhood of the slide.

Q. And so it was about 5 minutes after the slide when you got there? A. About that.

Q. Might have been a little longer?

A. Might have been a minute or two longer; yes.

Q. But when you came there there was quite a lot of water running over the top of the slide?

A. Yes.

Q. Whether it was 5 or 10 minutes after you wouldn't be sure? A. No.

Q. And about 10 o'clock in the morning, you think it was? A. Something like that.

Q. You looked up the hill and you saw a wide stream of water running out of the end of the flume?

A. Right near the mouth of the tunnel.

(Testimony of Martin Holst.)

Q. 10 or 15 feet from the mouth of the tunnel?

A. Looks like it—a few feet to the sheds of the tunnel there.

Q. It would be 10 feet—maybe 5 feet?

A. Something like that.

Q. Maybe 15 feet? A. I wouldn't be sure.

Q. It was about that distance, and the stream came right towards where you were standing so you could see the width of it? A. Yes.

Q. How wide was it? [215]

A. You couldn't tell to the foot, coming downhill, but it was a pretty good-sized stream—4 or 5 feet across—that is the way it would look.

Q. You couldn't tell how deep it was? A. No.

Q. Because it was coming towards you and you couldn't see through it? A. That is it.

Q. And that fell 50 or 60 feet and then hit the ground? A. Yes, sir.

Q. And that is the last you could see of it?

A. That is the last I could see of it.

Q. You only saw one stream coming down?

A. Just one stream.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Al Forsythe, for Plaintiff.

AL FORSYTHE, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Al Forsythe.)

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name, Mr. Forsythe?

A. Al Forsythe.

Q. What is your business? A. Police officer.

Q. You live in the town of Juneau? A. I do.

Q. Have lived here for some time?

A. Yes, sir.

Q. Were you a police officer on the 2d day of January, 1920?

A. Acting chief at that time. [216]

Q. You were acting chief of police. Where were you at the time of the slide?

A. At the time the slide happened I was in the Alaskan.

Q. That is the Alaskan Hotel? A. Yes, sir.

Q. About how far is that from the slide, or the foot of the hill? A. About a block and a half.

Q. It would take you how long to travel that block and a half?

A. Oh, I should judge a minute or two—as soon as I heard it I went down there.

Q. As soon as you heard the slide you went down there? A. Yes, sir.

Q. What did you see when you got down there, Mr. Forsythe?

A. Why, I rushed up the stairway and went around the slide there, and of course I heard these screams of the people that were underneath the slide, and I also looked up to see if there was any more coming down before I would cross, so I went over

(Testimony of Al Forsythe.)

to the building there where we were trying to get this man out.

Q. Did you see any water around there at that time? A. I did.

Q. Where did you see the water?

A. As I looked up the hill there the water was coming up over this place where the ground had broke, where the houses were,

Q. That is over back of what we call the head of the slide? A. Yes, sir.

Q. Where was this water coming from?

A. The way it looked to me, from the flume.

Q. How much water was there, about, Mr. Forsythe?

A. Well, I couldn't say exactly how much it was—it looked to me like probably 2 or 3 feet—something like that.

Q. Now, did you then go on over the slide or over the slide material?

A. I was there on the slide. [217]

Q. What was the nature of the slide material—the stuff you stepped into? A. You mean the mud?

Q. Yes.

A. It was all wet, and there was water still coming.

Q. Was it real wet and muddy? A. Yes, sir.

Q. And the water was still running?

A. Yes, sir.

Q. Do you know how long that water continued to run?

(Testimony of Al Forsythe.)

A. Well, when we were digging out that one man that was in there between the Goldstein building, I seen this water still coming, and I hollered down to Sim Frieman to have this water shut off, so he said, "It is already done,"—or he said, "They have already called up, but I will call up again," so he went over somewhere, and come back and he said that the Alaska Juneau had answered that they had already sent a man up to shut the flume off.

Q. How long did the water continue to run out of the flume?

A. Well, I don't know—it probably was 15 minutes or half an hour after that.

Q. And then it stopped? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. When you got there, Mr. Forsythe, the slide had occurred and was all over—when you got to the slide? A. Yes, sir.

Q. You were in the Alaskan Hotel at the time the slide happened?

A. I heard the rumble, and as soon as I heard the rumble I came out.

Q. And then you went down there, and you wouldn't say within a minute or two or five minutes when the water started to [218] come over the top of the slide—between the time the slide happened and the time the water started to come over the top of the slide?

(Testimony of Al Forsythe.)

A. It was probably a couple of minutes before I got down there.

Q. It probably was five minutes?

A. I looked right up at the head and the water was coming when I looked.

Q. You wouldn't say that was the first thing you did, or the second thing,—in all that excitement you wouldn't say just how long it was before you looked up, would you?

A. When I was going up the stairs there I looked right away—you see, I went up by the Windsor to cross over and I heard these people in there screaming, underneath this wreckage, and I looked up to see if there was any more danger so that I could cross over to where these bodies were,—I was afraid to go over there, so I looked up, and this water was coming then.

Q. This water that you first saw was coming over the top of the slide on the town side, wasn't it,—towards town? A. Yes, sir.

Q. It wasn't over the middle but a little ways toward town, the first water you saw coming over the slide?

A. It was up on the hill where she had broke.

Q. And on the town side of where it had broken loose? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. That was the first water you saw?

A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [219]

Testimony of C. C. Nichols, for Plaintiff.

C. C. NICHOLS, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is C. C. Nichols? A. Yes, sir.

Q. You live in Juneau, Mr. Nichols?

A. Yes, sir.

Q. How long have you lived in Juneau?

A. Since 1908.

Q. Were you in Juneau on January 2d, 1920, when the slide occurred? A. Yes, sir.

Q. Where were you at the time of the slide?

A. Down on the Admiral Dock.

Q. Was your attention attracted to the slide?

A. Yes, by the noise.

Q. As soon as you heard the noise what did you do?

A. I ran over to the door and looked up at it.

Q. What did you see there?

A. Why, I just see the houses come waltzing down the hill.

Q. Did you see any water up there?

A. Yes, sir.

Q. Where was the water?

A. Well, there was some coming over the hump up there, was the only water I noticed. There may have been some other streams there but I didn't notice them.

(Testimony of C. C. Nichols.)

Q. What did you do after that?

A. As soon as I saw the slide I ran in the office and got my camera and ran upstairs and took a picture of it.

Q. How long would you say that it took you from the time you heard the slide until you got up there to take the picture? [220]

A. I don't know exactly how many minutes it was—it was inside of ten minutes, I know.

Q. You were moving about as fast as you could, were you? A. Yes, I was running.

Q. Describe in detail how far you had to travel?

A. Well, I had to run back to the office—that is about 40 feet, I guess; and then I had to run outside again, and then upstairs.

Q. When you saw that water the first time, that was how long after you heard the crash of the houses?

A. Well, I saw it coming down there as soon as I heard the slide—I just took it all in at a glance.

Q. You just saw the whole mass move, did you?

A. Part of it I did—of course I didn't see it start.

Q. At that time you also saw the water?

A. Yes, sir.

Q. The water was coming over the slide?

A. Yes, sir.

Mr. HELLENTHAL.—Let the witness testify.

Q. What kind of camera did you use, Mr. Nichols, to take the picture?

A. No. 3—A Eastman.

(Testimony of C. C. Nichols.)

Q. What kind of a day was it for taking pictures?

A. It wasn't very good—the sun wasn't shining—kind of a drizzling rain; if I remember right, the day was rather dark.

Q. Is this the picture you took? A. Yes, sir.

Q. What does that picture show?

A. It shows the slide—where the slide occurred, and the water.

Q. Do you know whether that picture has ever been enlarged, Mr. Nichols?

A. No, I don't know whether it has or not.

Q. I show you this one.

Mr. RODEN.—Will you admit that this is an enlargement of the same picture, Mr. Hellenthal?
[221]

Mr. HELLENTHAL.—I have no objection to the enlargement—it looks to me like the same thing,—if counsel says it is, I will take his word for it, anyway.

Mr. RODEN.—As near as I know, it is an enlargement.

Mr. HELLENTHAL.—No objection.

Mr. RODEN.—I desire to introduce this in evidence then.

Mr. HELLENTHAL.—That is all right.

(Whereupon said picture was received in evidence and marked Plaintiff's Exhibit "O.")

Mr. RODEN.—That is all.

(Testimony of C. C. Nichols.)

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That picture, Mr. Nichols, represents the condition at the time you took it? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Beatrice Watts, for Plaintiff.

BEATRICE WATTS, called as a witness for the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Will you state your name, Miss Watts, please?

A. Beatrice Watts.

Q. How long have you lived in the town of Juneau, Miss Watts? A. Five years.

Q. On the day of the slide where were you?

A. On the Admiral dock, in the office.

Q. You were in the employ of the Admiral Steamship Company? A. Yes, sir. [222]

Q. How was your attention called to the slide?

A. By the rumbling noise of the slide.

Q. What did you do, Miss Watts, after you heard the noise? A. I ran out.

Q. And I suppose you looked in the direction of the slide? A. Yes, sir.

Q. What did you see there?

A. Well, by the time I got outside the slide

(Testimony of Beatrice Watts.)

had got down the hill, and I saw the water coming down the sidehill.

Q. Where was this water coming from, Miss Watts, with reference to the ground which had given way?

A. It was coming right over the slide.

Q. And you went out there to see, I suppose, as fast as you possibly could after you heard the noise? A. Yes, sir.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You were pretty excited, weren't you, Miss Watts, at the time? A. Yes, sir.

Q. And you came downstairs and you saw the slide—you didn't see the slide from upstairs—you came downstairs and saw it from downstairs?

A. I was in the office.

Q. In the office downstairs? A. Yes, sir.

Q. And you went out in front? A. Yes, sir.

Q. The buildings were all down at the time you got there, weren't they? A. Yes, sir.

Q. You don't know just how long the slide had been over? A. No. [223]

Q. You couldn't tell that? A. No.

Q. You saw water coming down the sidehill, and that entered the slide area on the Juneau side of where it had broken loose, didn't it?

A. What was that, please?

Q. The place where you saw the water running

(Testimony of Beatrice Watts.)

on to the slide was near the top of the Juneau side of the slide—on the Juneau side and not down-channel side, that is right, isn't it, as you remember it?

A. Right over the top, yes, sir.

Q. Your best recollection is that it was on the side towards Juneau—over the middle of the top towards the Juneau side, or wouldn't you be sure about that?

A. I wouldn't be sure.

Q. You don't know just exactly where it was coming over? A. No, sir.

Q. And you don't know just exactly how much water there was running there? A. No, sir.

Q. You watched it for quite a while, Miss Watts?

A. Yes, sir.

Q. You watched it for probably half an hour, did you?

A. I watched it longer than that—I watched it all the time that the excitement was around.

Mr. HELLENTHAL.—All right, that is all.

Q. (By Mr. RODEN.) This water, to the best of your recollection, you say was coming over the top of the slide? A. Yes, sir.

Mr. RODEN.—That is all.

(Witness excused.) [224]

Testimony of Sam Simonson, for Plaintiff.

SAM SIMONSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Sam Simonson.)

Direct Examination.

(By Mr. RODEN.)

Q. Your name is Sam Simonson? A. Yes, sir.

Q. What is your business?

A. Prospecting, mining, fishing and working.

Q. How long have you been in the Territory of Alaska, Mr. Simonson? A. Since 1906.

Q. Where were you engaged in the business of mining?

A. In Iditarod, Kuskokwim, here, in Tolovana, and different places.

Q. Where were you on January 2, 1920, the day of the slide? A. I was in Juneau.

Q. What were you doing about that time?

A. I was getting ready to go to Sitka the 2d day of January on the Estebeth, working for the United States Land Office,—the surveyors.

Q. Now, on that day did you pass up and down Front Street, on the morning of the slide?

A. I just come from the City Dock. I had been down with some few small things and I had to go back; and I came back again and went into Dave Housel's and had a cigar, walked out of Dave Housel's, walked up as far as the Coliseum and met a friend of mine there and stopped and talked, and I stood with my back toward the curb and he stood facing me, and all of a sudden he says, "Hey, there is a big body of water coming down that hill."

Q. Where was this water coming down this hill?

A. Coming down over the hog-back.

(Testimony of Sam Simonson.)

Q. Where was it coming from?

A. It was coming from up the flume there. [225]

Q. From what part of the flume?

A. Right close to the—I can show you here better than I can explain it, I guess—it came right, to me, looked to me like there was houses there, or a shed or something.

Q. I show you Plaintiff's Exhibit "N" and ask you to show about where this water was coming from.

A. Right here—here is where I seen it coming from—it come right straight down this way.

Q. Show the place to the jury where you saw it come from. A. Right down this way.

Q. How long was that before the slide happened?

A. Well, just as I turned around he hollered, "There comes the house," so it was just long enough for me to turn right around and see this side of the big yellow building start to come.

Q. Do you know whose building that was?

A. No, I don't know whose building that was, only otherwise I heard afterwards they called it Koseki's house, or Kloski house, or whatever it is.

Q. Who was the man who was with you?

A. Chris Michaelson.

Q. What did you do as soon as you saw and heard all of this?

A. We started on the run, both of us, and run down to where the slide was, where it come out just below the Goldstein building, where that old laundry is, and kept on going—we run up through the alley-

(Testimony of Sam Simonson.)

way between the old second-hand store, Pete's, and by the stairs, and in on where the slide was, from the stairs.

Q. What material did you see there then, where this slide was?

A. Broken up boards and water and dirt.

Q. What was the condition of the dirt?

A. Nothing but mud,—water and mud, that was all.

Q. What was the color of the water that you saw in there? A. Muddy water. [226]

Q. Was the water still running when you got there?

A. The water was still running from up the hill, yes, because as I stood there—we stood there looking, there was a woman come running out of the stuff there, and she was all muddied up, and blood was running off her cheek, and she was screaming; and just where I stood I heard somebody moaning right in under me, and I started in to tear off the boards and stuff and he was quite a ways down—I could not get at it, and there was a couple of more fellows there with me, and just as we started they hollered out on the street, “Look out, there is another slide coming.” I never stopped to look or anything. I jumped and just got down when the little houses come down on the street.

Q. How long did the water continue to run, about?

A. Well, I should say from 20 minutes to half an hour after the slide.

(Testimony of Sam Simonson.)

Q. And where was this water coming from with reference to the water that you saw just at the time of the slide?

Mr. HELLENTHAL.—Let him say if he knows—if he saw it.

Q. Well, did you see where this water was coming from then—that is, after the slide? A. Yes.

Q. Where was it coming from?

A. Because after I jumped down on the street I wasn't able to go back up there again because I jarred my whole body. I am a pretty heavy man and I landed right on my heels and ankles and they got pretty sore, so that is the reason I stood right in front of the whole thing and seen it.

Q. Where was the water coming from?

A. The water was coming from the same place I showed you on the picture.

Mr. RODEN.—That is all. [227]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. After you got down on the street after the alarm came that there was another slide coming, that was the first time you had occasion to see where the water was coming from,—I mean after you were on the street when you and that man were talking?

A. That time, and I seen it when I was on the slide too.

Q. When you were on the slide you didn't look up and see any water coming from there? A. I did.

Q. You couldn't see the penstock from there?

(Testimony of Sam Simonson.)

A. I couldn't see the penstock but I saw the water coming over the slide.

Q. Did you see water coming over the top of the hog-back before you got on the street?

A. No; from the street I could see that.

Q. You didn't see any water running over the hog-back and the top of the slide until you got on the street,—I mean the place where the slide had broken loose,—you didn't see that until you got on the street; isn't that right?

A. Where the slide had broke loose, I couldn't see the water running over there from where I stood on the wreck, yes.

Q. How long after the slide was it that you saw the water running—15 minutes, 20 minutes or 5 minutes?

A. It would be between 20 minutes and half an hour.

Q. The first time that you saw it it wouldn't be that long, would it? A. What do you mean?

Q. The first time you saw it running over the hog-back after the slide was between 5 and 10 minutes after the slide had happened, wasn't it, or wouldn't you want to say now how long it was?

A. I have got to get you first,—I don't understand now what you mean. I told you the first time I see any water was when the slide started. [228]

Q. Before the slide started or just at the time it started?

A. Just at the time it started. All I had time to do was to look around and look from the curb and

(Testimony of Sam Simonson.)

I seen the slide and the house come.

Q. And that time you saw the water up on top of the hill coming from the flume? A. Yes.

Q. That is all the water you saw at that time?

A. No, I seen more water—I seen water right on the slide too.

Q. On the slide?

A. Yes, right where the slide broke off. A lump of dirt broke away from the rest of it up above—the water come over that and hit that slide.

Q. Was that right after the slide happened?

A. Yes, after the slide happened.

Q. Immediately after, I am talking about?

A. Immediately after.

Q. You saw a flow of water at that place where it had broken loose right after the slide happened?

A. Why, yes,—I couldn't help seeing it.

Q. That is true, isn't it? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. How much water did you see?

A. Why, just about a sluice-head of water.

Q. And you saw that there at that time?

A. I seen it right along.

Q. Wait a minute—let's see. First, when you looked at it and first saw it break loose did you see a sluice head of water running over the apex of that slide?

A. Yes; I saw it from the first time I turned and run down on the sidewalk—that is the first time, and when I run down I couldn't see it, when I was running, because the houses [229] were in my

(Testimony of Sean Simonson.)

was there, and then when I got down there and looked again I see it.

Q And that water was coming right over the middle? A Yes, sir.

Q A big sluice-head of water? A Yes, sir.

Q And it was coming down right after the buildings had gone down, was it? A Yes, sir.

Q You are as sure of that as anything else you have testified to? A Yes, sir.

Q But you see any water in the gulches?

A No, sir. I didn't have no time to look for any water or any other thing but that slide—that is all my attention was called to.

Q That water you say coming from the flume was coming right out of the flume?

A Why, I couldn't tell you whether it came out of the flume or not, but it looked to me like it was a flume, because I will tell you, I seen two or three men up there working after I stood out on the street, and they were hammering and working up there at the same place that this water come from.

Q Now, there was about a sluice-head up there, wasn't there?

A It looked to be just about a sluice-head.

Q A sluice-head everywhere?

A Just about that.

Q And you are sure at that time, just before the slide happened, you turned around and saw that water, then the slide came, and immediately after the slide you say a sluice-head came right over the open? A There was water still running there.

(Testimony of Sam Simonson.)

I seen the slide and the house come.

Q. And that time you saw the water up on top of the hill coming from the flume? A. Yes.

Q. That is all the water you saw at that time?

A. No, I seen more water—I seen water right on the slide too.

Q. On the slide?

A. Yes, right where the slide broke off. A lump of dirt broke away from the rest of it up above—the water come over that and hit that slide.

Q. Was that right after the slide happened?

A. Yes, after the slide happened.

Q. Immediately after, I am talking about?

A. Immediately after.

Q. You saw a flow of water at that place where it had broken loose right after the slide happened?

A. Why, yes,—I couldn't help seeing it.

Q. That is true, isn't it? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. How much water did you see?

A. Why, just about a sluice-head of water.

Q. And you saw that there at that time?

A. I seen it right along.

Q. Wait a minute—let's see. First, when you looked at it and first saw it break loose did you see a sluice-head of water running over the apex of that slide?

A. Yes; I saw it from the first time I turned and run down on the sidewalk—that is the first time, and when I run down I couldn't see it, when I was running, because the houses [229] were in my

(Testimony of Sam Simonson.)

way then, and then when I got down there and looked again I see it.

Q. And that water was coming right over the middle? A. Yes, sir.

Q. A big sluice-head of water? A. Yes, sir.

Q. And it was coming down right after the buildings had gone down, was it? A. Yes, sir.

Q. You are as sure of that as anything else you have testified to? A. Yes, sir.

Q. Did you see any water in the gulches?

A. No, sir; I didn't have no time to look for any water or any other thing but that slide—that is all my attention was called to.

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A. Why, I couldn't tell you whether it come out of the flume or not, but it looked to me like it was a flume, because I will tell you, I seen two or three men up there working after I stood out on the street, and they were hammering and working up there at the same place that this water come from.

Q. Now, there was about a sluice-head up there, wasn't there?

A. It looked to be just about a sluice-head.

Q. A sluice-head everywhere?

A. Just about that.

Q. And you are sure at that time, just before the slide happened, you turned around and saw that water, then the slide came, and immediately after the slide you saw a sluice-head come right over the apex? A. There was water still running there.

(Testimony of Sam Simonson.)

Mr. HELLENTHAL.—All right, that is all.
[230]

Redirect Examination.

(By Mr. RODEN.)

Q. When you speak about a sluice-head of water, what do you mean—what is a sluice-head of water?

A. A sluice-head of water is—I can explain it to you in a way, where we use the boxes and use a sluice-head of water in them.

Q. That is what we want.

A. The standard kind of box is a 12-inch box, 12 foot long; you have a grade a foot—from 10 to 12 inches,—it all depends—some people have an idea that 10 inches is better than 12, and others again that 12 is better than 10. You call it a 10-inch grade for a box length—that is, 12-foot long; and in that box you have riffles that will probably take up about two or three inches down solid to the bottom of the box, and in there runs about—oh, I would say, between 7 and 8 inches of water—that is what we call a sluice-head of water.

Q. The grade is practically speaking about 10 inches to 12 feet?

A. Yes, 10 inches to 12 feet or 12 inches to 12 feet. If you have 12 inches to 12 feet you have to have so many more to shovel in because there is so much more force on the water.

Q. You say you heard men hammering up there?

A. Yes, sir.

Q. How soon after the slide was that, Mr. Simonson?

(Testimony of Sam Simonson.)

A. That was when I was down on the street,—I probably was on the slide, I should say probably 7 or 8 minutes before they hollered there; then I jumped down here and fell around on the street there—I could hardly stand on my legs, they were aching so, and I was sitting on the rail there between the bottle works and that other building, and looked up the hill, and then I seen two or three men—I think it was three men—and they were up there, and they were hammering and fixing it; and I looked at them for a little while, and a few minutes after that the water stopped running over.

Mr. RODEN.—That is all. [231]

Q. (By Mr. HELLENTHAL.) That water was all running in one stream, wasn't it, over the top when you saw it?

A. Yes, sir; all in one stream.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Chris. Michaelson, for Plaintiff.

CHRIS. MICHAELSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your first name, Mr. Michaelson?

A. Chris Michaelson.

Q. What is your business? A. Fisherman.

Q. How long have you been in the territory of

(Testimony of Chris. Michaelson.)

Alaska, Mr. Michaelson? A. About 7 years.

Q. And during that time you have following the fishing business generally, have you?

A. Yes, fishing all the time.

Q. Were you in the town of Juneau on the day of the slide? A. Yes, I was.

Q. What were you doing in the morning?

A. I just left the boat that was laying down at the lower city float—I was watching the boat the whole winter for my partner, who was in Frisco.

Q. That is the far dock down there?

A. Just this side of the oil dock.

Q. Did you go down there on that day, that morning?

A. No, I come from there. I slept on the boat, and took care of it. It was raining and I had my oil skins on—it wasn't raining extra heavy—just what we call Alaska weather—Alaska rain— [232] and I went into Frank's place, and then I went up to the post office and asked for mail because I expected a letter from my partner.

Q. When you passed Goldstein's place there, around about in there, did you have occasion to look up on the sidehill?

A. No, I didn't take no notice of it. I went straight on up to the postoffice.

Q. And then did you come back again?

A. Then I come back and I stopped right outside of the water fountain at the show there, and I met Sam there,—I knowed him for 15 or 20 years, and we always stopped and talked.

(Testimony of Chris. Michaelson.)

Q. You stopped right at the fountain there right in front of the Coliseum? A. Yes.

Q. Whom did you meet there?

A. Sam Simonson.

Q. All right—you had a talk with him?

A. Yes; and he stood with his back to the street and I stood facing this way, and I just happened to throw my eyes that way and I said to Sam, "Look at the body of water coming down the hog-back."

Q. Where was this water coming from, as near as you could tell then?

A. I don't know exactly, but the way it looks to me it comes from some kind of a box up there, but I don't know whether it was a shed or what it was.

Q. You called his attention to the water?

A. Yes.

Q. Then what happened?

A. Then I saw this steel tower going around, and then I saw a little house start to swing right around, and then we started to run.

Q. Where did you run to?

A. To the Goldstein building because it looks to me it was going [233] to strike there. I saw the, two houses and the bridge go out, running and then I got to Goldstein's place and the whole shooting-match just hitting the back of it, and I ran the other way and the first I met was a little lady, dirt from head to feet and bleeding from the cheek.

Q. Did you see any water coming over this material?

(Testimony of Chris. Michaelson.)

A. Yes, I saw 8 or 10 feet of water in a stream 3 feet deep in the back of Goldstein's place. I waded across that stream with a man on my back—the second man taken to the hospital.

Q. Did you go to the hospital with the man?

A. I took him right to the hospital, and put him on the stretcher.

Q. Did you come back again to the slide?

A. I rode half way in an automobile and walked the other half.

Q. How long was it from the time of the slide until you came back?

A. I couldn't tell you exactly—it was after twelve o'clock, anyway.

Q. How was the water condition then?

A. When I come back I come back exactly the same way and there wasn't a foot of water or dirt around there, but there was dark brown muddy stuff running the same way. It wasn't a foot thick; when I carried the man across it hit me here—I had rubber boots on.

Mr. RODEN.—You may cross-examine.

Mr. HELLENTHAL.—No questions.

(Witness excused.) [234]

Testimony of Robert Kirk, for Plaintiff.

ROBERT KIRK, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Robert Kirk.)

Direct Examination.

(By Mr. RODEN.)

Q. You may state your name.

A. Robert Kirk.

Q. Where do you live, Mr. Kirk?

A. I live up on Swede Hill.

Q. How long have you lived up there?

A. Oh, off and on the last two years I have been there.

Q. Where were you living with reference to the Koski house?

A. I guess I am living maybe about 300 yards this side of it.

Q. Were you living up there at the time of the slide? A. Yes.

Q. Now, on the morning of the slide, before the slide, did you leave your house? A. Yes.

Q. Where did you go to?

A. I went over to Messerschmidt's bakery.

Q. And about what time did you go up there to the bakery?

A. Well, I should judge it would be about 10 o'clock.

Q. Did you have occasion to look up on the side-hill about that time in the direction of the flume and penstock?

A. No, I didn't look up on the hill.

Q. Did you come back again to your house?

A. Yes.

Q. How long did you stay up town, about?

A. Oh, I guess I was gone about 15 minutes.

(Testimony of Robert Kirk.)

Q. Then did you have occasion to look up?

A. Yes.

Q. What did you see?

A. Well, when I was in the door I saw that water coming out of the flume. [235]

Q. Where was this water coming from?

A. Well, it was coming out of some flume up there.

Q. Whereabout with reference to the location of the Koski house?

A. It was coming right over and hitting sort of a hog-back there on the side of the hill.

Q. Where were you when you saw that?

A. Right in the cabin.

Q. Do you remember when the slide happened?

A. I should judge it would be somewhere around about 11 o'clock.

Q. About how much water did you see come out of there at that time,—not at the time of the slide, but I mean at the time you came back from the bake-shop?

A. Oh, I don't know—maybe about 3 feet of water was coming over there—that is, about 3 feet wide.

Q. You don't know how thick?

A. No, I don't.

Q. Where were you at the time of the slide?

A. I was right there at the house.

Q. Did you do anything—go out and take a look?

A. I was outside of the door—I heard *and* noise and I heard the crashing come along.

(Testimony of Robert Kirk.)

Q. Then what did you do?

A. I run up the steps on Gastineau Avenue there to where the houses come through the bridge.

Q. What did you see there in the way of water?

A. The water was coming down there.

Q. Where was it coming down from?

A. Just where the slide had come out.

Q. And did you stay there for any length of time?

A. No, I stood there and come on back by the same way because I couldn't go down that hill—there was too much water.

Q. How long did this water continue to run?

A. Well, I should judge about half an hour afterwards it was shut off. [236]

Q. Did you go over the slide area—in the slide mass?

A. Yes, I was over and helped to take some of the people up—I took a man up to the hospital, by the name of Callendar, I believe his name was—Emil Callendar—I took him out of the back of the slide.

Q. What material did you take him out of?

A. Boards and muck and gravel.

Q. Any water in there?

A. Oh, plenty of water, yes.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Did you see any water coming out of the bank from the bedrock after it happened?

A. Yes; there was water coming out of there

(Testimony of Robert Kirk.)

when I went up to Gastineau Avenue, where the slide had come out—water was still hitting that place.

Q. There was water coming out of the bank itself where the slide had broken loose?

A. Where the apex was, the water was hitting there.

Q. Tell me what the word apex means.

A. Where that cavity was.

Q. Tell me what the word apex means.

A. Where that cavity, the slide or bank, had given way.

Q. You mean by the apex the place where there was kind of a cup-shape, where the bottom of the cup broke loose?

A. Where the hog-back had went.

Q. Now, what does apex mean—the word apex?

A. That is what I would call it?

Q. What does it mean?

A. That is all the meaning I would give to it.

Q. Where did you first hear that word?

A. I have heard it and read of it lots of times.

[237]

Q. Now, you know what it means, don't you?

A. That is what I would figure it out to be.

Q. Don't you think that some fellow that has had a better education than you told you this water came over the apex of the slide—don't you think that is about it? A. No.

Q. You have known that word all of your life, haven't you?

(Testimony of Robert Kirk.)

A. I am not totally ignorant about the word.

Q. You don't know what the word means, now, do you? A. That is my definition of it.

Q. What is your definition of it?

A. That place where the hog-back had come out—where that slide was—I call it apex.

Q. What does the word apex mean?

A. That is the meaning—all I can give for it.

Q. Did you see any water coming out of the bank, at the upper end of where the slide had broken loose, off the bedrock?

A. No, that water was just about hitting the edge where the dirt had come out—the water was running over that—this cavity that was there.

Q. The water was running over that? A. Yes.

Q. The water came out of that draw right at the side of the slide, didn't it? A. No.

Q. Came right over the top of it? A. Yes.

Q. How long after the slide was that—10 minutes, 5 minutes—15 minutes.

A. No, after the slide it took me, I guess, about two minutes to go up there.

Q. Where were you when the slide happened?

A. Right in my cabin.

Q. In your cabin? [238] A. Yes, sir.

Q. Did you see the slide?

A. Yes, I saw the houses coming.

Q. Where did you see the houses?

A. Right from where I was.

Q. Where were they when you first saw them?

A. Right outside of my cabin there.

(Testimony of Robert Kirk.)

Q. You were right outside of your cabin and you were looking at the houses?

A. I seen them coming—I seen one house coming and I went up to Gastineau Avenue—I only had about two minutes walk.

Q. You didn't run right into the ground where it was sliding—didn't you stop and see how wide that slide was going to be?

A. They were all gone by the time I got there—they were all down to Goldstein's.

Q. Everything was perfectly safe?

A. Lots of people were there.

Q. What was the first thing you did? Did you look at the stuff that was gone, or look at the water?

A. You couldn't help but see—there was still debris and water and everything running down there.

Q. Yes, running down over the slide—it was all muddy down there, wasn't it? A. Yes.

Q. And the water was running down over the slide? A. Yes.

Q. You saw that first?

A. There was nothing left there—the Koski house was the first house that went, and it took part of another house and the bridge with it, and still went on.

Q. You examined the business, and a little later you looked up the hill and you saw water there, is that right? A. That was at least two minutes.

Q. Maybe five? [239]

(Testimony of Robert Kirk.)

A. It couldn't have been over 2 or 3 minutes—it wouldn't take me any longer than that to go 200 yards.

Q. You don't know now just exactly how long it would be after you came to the slide that you saw the water coming over what you call the apex, do you?

A. The water still continued to come over there.

Q. You don't know how long it was before you saw it coming over there, do you?

A. Previous to the slide?

Q. No, after the slide happened, Mr. Kirk.

A. Yes—probably half an hour.

Q. You saw it before—that wasn't the first time you saw it?

A. No, I saw it before the slide.

Q. Yes, up on the hill? A. Yes.

Q. But after the slide happened, I mean, you saw it coming over the apex. Now, when did you see it coming over the apex?

A. When I went up on Gastineau Avenue—that is three minutes afterwards.

Q. You didn't look up there the first thing to look at the water—you looked down to Goldstein's to see what had happened to the buildings, first, didn't you?

A. I looked at that side—you have to walk along Gastineau Avenue and you look along on that side and then on this side—you couldn't help it.

Q. And you used one eye to see the buildings and one eye to see the water?

(Testimony of Robert Kirk.)

A. No, I saw both sides.

Q. How big a stream was that coming over there?

A. Oh, I would judge 3 feet wide.

Q. Was it a clear stream 3 feet wide coming over the top? A. Yes, sir.

Q. Like water falls? A. Yes.

Q. A regular water fall? [240] A. Yes, sir.

Q. Only one stream? A. That is all I saw.

Q. One stream 3 feet wide? A. Yes, sir.

Q. Running over there like a water fall?

A. Yes, sir.

Q. Is that what you saw? A. Yes, sir.

Q. When you first saw the water you saw that?

A. Yes, sir.

Q. When was it you first saw the water before the slide?

A. When I came back from the baker-shop, that is the first time I saw it.

Q. What time would that be?

A. It must have been a quarter-past ten.

Q. At that time you looked up the hill and you saw a stream of water coming down off the flume, I believe you said? A. Yes.

Q. How wide was that stream?

A. Just about the same.

Q. About 3 feet wide? A. Yes sir.

Q. It was coming right off the flume and running down towards the channel?

A. No, it wasn't even facing the channel—that water wasn't facing the channel—that water had a sort of an angle.

(Testimony of Robert Kirk.)

Q. In what direction? A. This direction.

Q. Could you tell how thick the stream was?

A. No, you couldn't tell that.

Q. You couldn't tell that?

A. No, I couldn't tell how thick the stream was.

Q. It was facing down along the course of the hill? [241]

A. It was facing more this way, like,—coming this way, towards my cabin.

Q. And it was about 3 feet wide?

A. Yes, just about that.

Q. Was it any wider than that?

A. I don't know—it may have been—I never measured it.

Q. You couldn't see how thick it was?

A. No, I couldn't.

Q. And you wouldn't be able to tell how much water there was in that stream?

A. No, I wouldn't have any idea how much water was in it.

Q. Wasn't that just before the slide that you saw that?

A. Yes, I saw that amount of water before the slide.

Q. It was just about five minutes before the buildings came down that you saw that up there, wasn't it?

A. No, I didn't see that five minutes before the buildings come down—I told you I saw that much about a quarter-past ten. I went down to the baker-shop and it was a quarter-past ten when I

(Testimony of Robert Kirk.)

came back there and I saw that water then. I went in my cabin and came out again, and I was shoveling some stuff in front of my cabin door down the hill there.

Q. How far did that water drop before it hit the ground?

A. I don't know—I couldn't tell—I never measured it—I couldn't tell how far it would be.

Q. You heard the testimony of a witness who testified here a little while ago that it went about 50 or 60 feet—would that be about right?

A. I couldn't tell whether it was 50 or 60 feet—maybe that big back to where it was—I couldn't tell.

Q. I mean how far did it drop from where it left the flume until it hit the ground?

A. I don't think it would—I don't think it would drop anything like that—maybe 20 feet, maybe 25 feet.

Q. How many streams did you see up there—more than one? [242] A. I only saw one.

Q. That is all the water that was running?

A. Yes.

Q. Just one stream? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Emil Thompson, for Plaintiff.

EMIL THOMPSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Emil Thompson.)

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name, Mr. Thompson?

A. Emil Thompson.

Q. Where do you live? A. On 10th Street.

Q. In the town of Juneau? A. Yes.

Q. How long have you lived in Juneau?

A. About 25 years.

Q. What is your business?

A. Fishing and prospecting and mining.

Q. Were you in the town of Juneau on the day of the slide? A. Yes.

Q. What were you doing in the morning of that day?

A. I come from the City wharf, was going up to Charley Goldstein's.

Q. What had you been doing at the City wharf?

A. I laid there with a boat.

Q. About what time was it you left the City wharf? A. About nine, I guess, I left.

Q. And which way did you come up town? [243]

A. I went up town on the street there.

Q. You came up what we call Front Street?

A. Yes.

Q. At that time did you have occasion to look up on the sidehill? A. Yes, sir.

Q. In the direction of the Alaska Juneau flume and penstock? A. Yes, sir.

Q. What did you see, if anything?

A. I saw a stream of water coming out of there.

(Testimony of Emil Thompson.)

Q. Where was the stream of water coming from?

A. I never been up there, so I don't know—out of a flume of some kind.

Q. Where was this stream of water going to?

A. It went down the hill, down towards Izzy Goldstein's.

Q. How much water was there, about, Mr. Thompson?

A. It was a long distance—I guess about 3 foot, 3 foot and a half, or something.

Q. That was wide? A. Yes.

Q. You couldn't see how thick the water was?

A. No, sir.

Q. When you saw that water what did you do afterwards? A. I went right along.

Q. Where did you go to?

A. Charley Goldstein's.

Q. You went to the store of Charley Goldstein?

A. No, sir, I didn't quite get there yet—I met a couple of men there later on and I told them fellows, "If they don't get that off they will have a big slide over there."

Mr. HELLENTHAL.—Don't tell any conversation.

Q. You went into Charley Goldstein's store?

A. Yes, sir.

Q. That store is located on what street—Second and Seward Streets, is it? A. Yes. [244]

Q. I don't want to get the two locations mixed up, that is why I am asking you. A. Yes.

Q. Did you go back to the city float again?

(Testimony of Emil Thompson.)

A. Went back there, yes.

Q. Where were you at the time the slide occurred?

A. A little past Marshall and Newman's.

Q. Where is Marshall and Newman's with reference to Izzy Goldstein's place?

A. Just a little way from there—about a block and a half, I guess, or a block.

Q. It is on the opposite side of the street, is it?

A. Yes, sir.

Q. What happened then when you got down there?

A. I looked in a window there at some spark coils, and two or three, they were hollering around back of Izzy Goldstein's, and I looked back and the houses were coming there.

Q. Did you see the houses come down?

A. Yes.

Q. What else did you see up there?

A. I see houses come over—I couldn't walk very far, I hurt myself in the back some time ago.

Q. Did you see any water up there then?

A. Yes, there was water coming over.

Q. Where did you see the water coming from?

A. There was water, sand, mud and everything.

Q. Where was that water coming from?

A. Coming from that flume.

Q. Which flume?

A. The flume back of Izzy Goldstein's.

Q. Up on the hillside? A. Yes.

Q. Where was this water running at the time that

(Testimony of Emil Thompson.)

the slide happened with reference to the place that you saw it before you came up town? [245]

A. The water was running the same way.

Q. How long did you stay down there after the slide?

A. Well, I stayed there about an hour or so, I guess.

Q. Did the water continue to run all that time?

A. The water was running about half an hour.

Q. And then it quit? A. Yes.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Thompson, how long before the slide was it that you saw the water on the hillside?

A. I left there about half-past nine.

Q. Now, you saw a stream of water about 3 feet or more wide?

A. About 3 feet—something like that.

Q. It was coming right towards you, where you were, when you saw it down there on Front Street?

A. I was on Front Street, yes.

Q. Where on Front Street?

A. Well, I saw it at different places among the houses.

Q. Were you in front of the soda works—along there?

A. When I went up to Charley Goldstein's I saw it in different places, and when I come back I saw it.

Q. When you first saw it where were you?

(Testimony of Emil Thompson.)

A. I was on this side of Forrest's, some place.

Q. Up there by the Forrest building on Front Street? A. Yes.

Q. That is a little the other side of Izzy Goldstein's store? A. Yes.

Q. That is where you first saw the water coming from the flume? A. That is the first.

Q. And the stream then was about 3 feet wide, you think?

A. I didn't pay much attention to it then, before I come on [246] this side of Izzy Goldstein's—a little this side.

Q. When you saw it there in front of Forrest's place you could see how thick it was, could you?

A. No.

Q. You couldn't see how thick it was because it was running right towards you? A. Yes.

Q. You could only tell how wide it was?

A. I couldn't tell that either at that distance.

Q. The distance was too great to tell just how wide it was? A. Yes.

Q. But you could see the width of it, anyway?

A. I couldn't tell that either because I judge it was 3 foot or 3 foot and a half or so.

Q. You couldn't tell as to the thickness—I don't mean that—because you were right abreast of it?

A. Yes, just about abreast of it.

Q. The stream was coming right towards you so you could see the face of it—that is what I mean?

A. I don't remember the face of it—the face facing to me, I don't remember that either—I don't

(Testimony of Emil Thompson.)

remember whether it was facing to me or sideways, or face to me—I don't know—I won't say.

Q. How far was it dropping from the flume down to the ground?

A. I don't know—I never been up there.

Q. From what you could see how far did it look?

A. I couldn't tell you anything about that—I seen it.

Q. You saw a stream there and that is about all you know, isn't it, Mr. Thompson?

A. Yes, about all I know about that.

Q. You don't know how far it dropped before it hit the ground, or where it went? A. No.

Q. You don't know where that water went after it hit the ground? [247]

A. Yes, I saw it come downhill.

Q. Where did you see it?

A. I saw it after the slide happened.

Q. But I mean at the time you first saw it—you couldn't see where it went after it hit the ground?

A. I saw the stream, yes.

Q. After the slide happened you saw the water on Front Street? A. Yes.

Q. That is what you mean? A. Yes.

Q. But before the slide happened you saw it on top? A. I saw it on top, yes.

Q. But you couldn't see then where it ran to?

A. Not that time.

Q. No, not that time? A. No.

Q. How many streams did you see there—one or more streams? A. Only one stream.

(Testimony of Emil Thompson.)

Q. And that stream, where was that with reference to the mouth of the tunnel,—you know where the mouth of the tunnel is there, don't you?

A. No, I don't—I never been up there.

Q. It was right there where that shed is, wasn't it? A. Yes.

Q. There is a shed there—quite a wide shed?

A. Yes.

Q. The shed is about the width of this room—maybe a little wider—50 or 60 feet, right where the water was?

A. Alongside that shed, yes, the water come over.

Q. The water came over alongside of that shed, and that shed is about 40 feet wide, isn't it?

A. I don't know—I never have been up there.

Q. I don't mean that you could say exactly how wide, but near that? A. I couldn't say. [248]

Q. You would say something like that, wouldn't you?

A. I put up one shed like that myself and I made it 20 feet square.

Q. You don't know what the length of it is, but it is at least 20 feet? A. Yes.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. Do you know what that shed was being used for, Mr. Thompson—do you know what was in that shed? A. Penstock, I believe.

Q. You know what a penstock is, do you?

A. Yes, I have constructed some.

(Testimony of Emil Thompson.)

Q. You have constructed some penstocks, have you? A. Yes.

Q. And this water came out of the penstock?

A. Yes.

Mr. RODEN.—That is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. Who told you that was a penstock up there?

A. It must be because I make some myself.

Q. When was the first time you heard there was a penstock up there?

A. I come to that myself because the pipe is running down the hill from the penstock; there has got to be a penstock there.

Q. Did you see the pipe running down the hill?

A. I did.

Q. Where? The pipe is covered under the ground, isn't it?

A. It wasn't years ago—it wasn't covered.

Q. There was a time you say that pipe wasn't covered? A. I see some part of it. [249]

Q. You saw some part of it—there was a time when a part of that pipe wasn't covered?

A. Some time.

Q. And now you know where that pipe laid. How many years ago was that pipe laid?

A. I wasn't there when they laid it.

Q. Was it at the time they laid it that you saw that pipe? A. I don't remember that.

Q. When did you see it?

(Testimony of Emil Thompson.)

A. I saw it some time—I passed by up and down.

Q. And you don't know when? A. No.

Q. And that is how you judge that that place is where the penstock must have been? A. Yes.

Q. Because you saw a pipe some time, you don't know when? A. Yes.

Q. What else have they besides the penstock?

A. They must have a flume.

Q. Did you see the flume? A. No.

Q. You don't know anything about that pipe you saw? A. No.

Q. You never saw the flume or penstock, but you know they must have a flume and penstock?

A. I have never been up there.

Q. You never looked at the flume or penstock?

A. I looked at the flume, and I looked at the penstock—I looked at the house.

Q. How was that penstock built?

A. Well there is one way to build them—I built two of them—I built them 20 feet square and 12 feet high.

Q. How was this one built up here? I am not talking about the one you built. [250]

A. I don't know which way you built it.

Q. You don't know anything about this one?

A. No.

Q. You don't know anything about it? A. No.

Q. You never saw this penstock up here?

A. No.

Q. You never saw the flume?

A. Except at a distance.

(Testimony of Emil Thompson.)

Q. You know there was a flume and penstock up there by what people have told you?

A. No, I saw it with my own eye from the distance—I can see from the street.

Q. Did you from the street see the flume and the penstock?

A. Yes, I could see the house there.

Q. You could see the house there, but did you see the flume and the penstock?

A. I saw it from the street, yes.

Q. Did you see the flume from the street?

A. Yes.

Q. Did you see the penstock from the street?

A. I can see that little house there.

Q. Can you see it now? A. I never looked.

Q. Look out and see.

A. No, I cannot see so far now.

Q. Did you see any other houses up there at that time except the penstock?

A. I don't remember.

Q. Did you see any other houses up there at that time except the penstock when you saw the water running?

A. I don't remember whether there was other houses there or not.

Q. You don't know? A. No.

Q. You didn't see any? [251] A. No.

Q. You only saw that one building, maybe 20 or 30 or 40 feet long? A. What?

Q. You only saw one building up there?

(Testimony of Emil Thompson.)

A. I saw one building—I saw that building that is said to be the penstock.

Q. And that house that you talked about, did it have a roof over it?

A. I wouldn't say from a look at it.

Q. You don't know? A. No.

Q. You don't know how it looked, then?

A. No.

Q. Do you know where the tunnel came out?

A. The tunnel came out right close to where the house is.

Q. Did the tunnel come out at the same place that you saw the stream of water?

A. The water came out right at that little house.

Q. Who told you to say that the water came out of that little house?

A. Nobody—I told you because I seen it.

Q. Every question I ask you, you make that same answer, don't you, the water came out of that little house?

A. Alongside of the house—the little house.

Q. Where was that little house with reference to the portal of the tunnel—was it near the tunnel or a long ways from it?

A. I never was up there—I never saw it.

Q. You could see the tunnel, couldn't you?

A. I never watched it.

Q. You have been on Front Street a good many times and looked up that hill, haven't you?

A. Yes.

Q. Could you see the mouth of that tunnel?

(Testimony of Emil Thompson.)

A. I never watched it—I never looked up.

Q. The only time you ever looked up there was the time you saw [252] this water?

A. Yes, I saw the water—I couldn't help that.

Q. That was the only time you ever looked up there?

A. Oh, I looked up there lots of times.

Q. Did you ever see the mouth of the tunnel going into the mountain there?

A. I ain't in Juneau all the time—I might have seen it, but I ain't in Juneau all the time—I am out lots of times.

Q. Was that little house right at the portal of the tunnel or a long ways away from it? Do you know, or don't you know?

A. I don't know anything about what is right there.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. Show us on this picture here where this little house is located that you are talking about.

A. I cannot see it with these glasses—not very good.

Q. Well, if you cannot see it say so?

A. No, I cannot see it.

Q. Have you had much experience around penstocks, Mr. Thompson?

A. Yes, I have made them.

Q. Where?

A. The last one I made was down to Snettisham.

(Testimony of Emil Thompson.)

Q. Where did you make the other one?

A. I made that over in the old country.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) Did you see water coming out of them in the old country, too?

A. No, I did not.

Mr. HELLENTHAL.—All right; that is all.

(Witness excused.) [253]

Testimony of Charles Helsing, for Plaintiff.

CHARLES HELSING, called as witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Charles Helsing.

Q. What is your business, Mr. Helsing?

A. Fisherman at the present time.

Q. How long have you been engaged in the fishing business? A. About 4 years.

Q. And during that time you have made Juneau your headquarters, I suppose? A. Yes, sir.

Q. Were you in Juneau the day of the slide?

A. Yes, sir.

Q. On the 2d day of January, 1920?

A. Yes, sir.

Q. What were you doing that day?

A. I came walking up the street.

Q. Where were you coming from?

A. From the City Float.

(Testimony of Charles Helsing.)

Q. When you were coming up the street did you have occasion to look up on the hillside in the direction—

A. Well, it would draw any one's attention to the hillside that morning.

Q. What called your attention to it, or drew your attention to it?

A. An excessive flow of water.

Q. Where did you see any water flowing that morning?

A. It came from a flume or wooden box up on the hillside.

Q. Where did you see the water?

A. It came from a wooden box,—a kind of a flume, I guess. [254]

Q. Where was that wooden box located, or flume?

A. It was somewheres abreast of Forrest's building—somewhere around there, I should judge, upon the hillside.

Q. Abreast of the Forrest building?

A. Somewheres around there.

Q. What time did you see any water coming over that?

A. About half-past ten, just about.

Q. Where did you go to then?

A. I was on the road up to the Customs-house.

Q. Did you go to the Customs-house?

A. Yes, sir.

Q. Did you return again? A. Yes, sir.

Q. Where were you at the time the slide happened?

(Testimony of Charles Helsing.)

A. I was down the street—I didn't see the slide.

Q. Whereabouts were you?

A. I must have been down close to the sawmill, I think.

Q. Did you turn back then and go to the slide?

A. Of course—we all heard the rumble, the noise.

Q. Did you turn back and go to the place where it happened? A. Yes, sir.

Q. What did you see then?

A. It was all down the hillside—most of it, I expect—and of course water running.

Q. You saw water running? A. Yes, sir.

Q. Where did you see water running?

A. Right over the ground that slid down.

Q. The water which you had seen about an hour or so before the slide, where was that running with reference to the place where the dirt had moved away? A. Why, over the same place.

Mr. RODEN.—You may cross-examine. [255]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. What time in the morning did you see the water? A. About half-past ten.

Q. You were in front of the Forrest building on Front Street?

A. I come walking up—I could see it right from the city dock coming up this way all the time.

Q. From the city dock coming towards town?

A. Uptown; yes.

Q. You could see it on Front Street? A. Yes.

(Testimony of Charles Helsing.)

Q. How wide was that stream that you saw coming down?

A. I couldn't judge exactly how wide because distance makes a big difference in knowing those things, but it must have been 4 or 5 feet wide over the hillside.

Q. That was about half-past ten in the morning?

A. Yes, sir.

Q. And that stream at that time that you saw was 4 or 5 feet wide coming from the flume?

A. I should judge it was.

Q. How far did it fall before it hit the ground?

A. At what place?

Q. How far down did it fall before it hit the ground—it came down like a waterfall, didn't it?

A. Whereabouts do you mean, Mr. Hellenthal—at the flume?

Q. Yes, at the flume.

A. It must have been 10 or 15 feet, I guess—it couldn't have been much farther—the flume is built on the ground.

Q. Did you notice at that time how far it dropped?

A. All I could see, it came right from the flume and hit the ground.

Q. Did you notice how far it had to fall before it hit the ground?

A. No, sir, I couldn't tell—I should judge around 10 or 15 feet.

Q. The stream was 4 or 5 feet wide, you say?

(Testimony of Charles Helsing.)

A. Not at the flume—it was farther down—it would spread out.

Q. How wide was it at the flume?

A. I couldn't know that much of a distance there but it must have been two or three feet.

Q. It was a white stream? A. Yes, sir.

Q. You couldn't tell how thick it was, could you?

A. No, sir, not from the street I couldn't say that.

A. The stream was coming right towards you?

A. No; on the street the water shot off on an angle from where I was.

Q. You couldn't see the thickness, you say?

A. No, I couldn't see that.

Q. You could only see the width of it from where you were on Front Street?

A. Judging about the width—I couldn't say exactly how wide it was.

Q. No, I don't mean exactly, but you could see only the wide side of the stream when you were on Front Street? A. Yes, sir.

Q. You don't know how wide it was?

A. No, sir.

Q. But you think it was 3 feet, anyway?

A. Yes, sir.

Q. And widened out a little as it hit the ground?

A. It had to do that of course.

Q. You couldn't say now how far it had to drop to get down? A. No, sir.

Q. You know where the tunnel is up there, don't you?

(Testimony of Charles Helsing.)

A. Just about where it is—it can be seen, I guess.

Q. The stream was just about where the tunnel is?

A. No, it wasn't—the place where the water came out must have been north of the tunnel a little but how much I couldn't say because you couldn't see the tunnel exactly. [257]

Q. It would be about how many feet north of the tunnel where the stream was?

A. I couldn't say exactly.

Q. 10 or 15?

A. No, it must have been more than that—it must have been something like 20 or 25 feet—somewhere along there—I don't know because I couldn't see the tunnel exactly.

Q. Would you say between 25 and 30 feet?

A. Something like that.

Q. How many streams did you see—one stream or more streams?

A. I saw only one big stream. Of course there are a couple of gulches that are always running when it is raining.

Q. There was only one big stream coming from the flume?

A. Yes, sir; that is all I could see—I didn't see any more.

Q. Were there any little streams coming from the flume?

A. I didn't see any little streams, no, sir.

Q. You only saw one stream? A. Yes, sir.

Q. That was a big stream? Yes, sir.

(Testimony of Charles Helsing.)

Q. And that was the only stream you saw?

A. Yes, sir.

Q. How long after the slide was it when you got to the slide?

A. It must have been 5 minutes, I guess—I don't think it could have been more.

Q. Where were you when the slide happened?

A. I was down towards the sawmill, where I live.

Q. And you don't know how long it was before you got to the slide?

A. No; it would take me about 5 minutes to come up there.

Q. Did you hear the slide?

A. Yes, the rumble of it, yes.

Q. And then you turned back? A. Yes, sir.

[258]

Q. You were at the sawmill you say when you heard the rumble of it?

A. Somewhere around there.

Q. And you went back to where the slide was?

A. Yes, sir.

Q. And when you got there that time that is when you saw the water coming over the top?

A. I saw water before that slide.

Q. I know you did before, but I mean after the slide—after you got back to the slide, did you see any water then? A. I did, too, yes.

Q. At the same place? A. At the same place.

Q. There was water still running there?

A. Yes, sir.

(Testimony of Charles Helsing.)

Q. When you got to the place where the slide happened did you see water running over the street there? A. Why, it was down.

Q. How is that?

A. The upper street was down.

Q. I am talking about Front Street where Goldstein's store was—was there any water on that street? A. Surely.

Q. There was quite a lot of water running down there when you got there, wasn't there?

A. Yes.

Q. And there was water coming between the buildings there?

A. Yes, between the buildings.

Q. At that time was there any water coming over the top of the slide where the slide broke loose? A. There was, yes.

Q. How much?

A. The same as before—about the same.

Q. You are talking about this flume?

A. Yes. [259]

Q. I am talking about where the slide broke loose. When you first got there was there any water coming over that? A. The same place, yes.

Q. You had never seen water coming over that place before, had you?

A. No, but the same amount of water was coming as was before.

Q. Before the slide you didn't see any water where the slide broke loose, did you?

A. It came right over from where the slide broke

(Testimony of Charles Helsing.)

loose—it came from the flume.

Q. You couldn't see where that water went to, could you?

A. It went into a small grove of trees—those trees came out in a lot of brush.

Q. It ran into the brush?

A. I didn't say brush—I said trees.

Q. You couldn't see where it went to after that?

A. Yes, I could—it came out of these trees in the brush.

Q. You couldn't see where it went after it got through the brush?

A. Yes, you could see where the water went to.

Q. Where did that water go to?

A. It went over this ridge that they call a hog-back.

Q. And you saw that? A. Yes, I did.

Q. What is a hog-back?

A. It is a ridge between two gulches, as a rule.

Q. What hog-back did you see the water coming over?

A. I call it a ridge—I said some people call it a hog-back.

Q. That was after the slide you saw that?

A. Yes, sir—before the slide too.

Q. Before the slide you saw that water coming from the flume? A. Yes.

Q. And you knew just where it went to?

A. It was a big volume of water—that is the only place you could get a big volume of water was from the flume.

(Testimony of Charles Helsing.)

Q. Did you trace that water down the hill, just where it went to, [260] before the slide?

A. I certainly did not.

Q. It was after the slide that you saw the water down below?

A. I saw water coming down all the time.

Q. You saw the water coming down where it came from the flume just before the slide, didn't you?

A. Surely.

Q. You didn't see it before the slide down at Goldstein's store, did you?

A. No, I don't think so, no.

Q. You didn't see any water before the slide except on the top, where it came from the flume—isn't that right?

A. It came down—it took it some time to flow through that loose gravel and dirt up there.

Q. Wasn't there a dump up there?

A. No dump, no.

Q. There was a lot of kind of loose gravel up there—a dump?

A. No, it was no dump—it was a ridge between two small gulches—couldn't be no dump from the hillside above.

Q. It came through small gulches, you say?

A. No, I didn't—I say there was a ridge with two small gulches on each side of it, and it carried the dirt down.

Q. It went between those two gulches?

A. No, it didn't—it went on the ridge.

Q. That is where you saw it after the slide?

(Testimony of Charles Helsing.)

A. And before the slide, too.

Q. And you are sure of that? A. Yes, sir.

Q. And you are sure of everything except how far that water had to drop to the ground, aren't you?

A. I told you I couldn't judge that from the distance.

Q. How big a stream did you see going down over the hill—over the hog-back? [261]

A. It is pretty flat down there—the ridge is fully covered with brushes and grass and of course it spread out down there.

Q. How wide was it?

A. I couldn't say—probably 7 or 8 feet—something like that, in that flat part.

Q. A big stream 7 or 8 feet wide was coming over the hog-back—that is right, is it?

A. It wasn't exactly one solid stream up on the hog-back, because it was covered with brushes, etc.—it ran in between.

Q. It was 7 or 8 feet wide when you saw it up on the hog-back?

A. Just about—I would say—the whole thing together.

Q. Yes, that was the width of the stream—the whole stream together? A. Yes.

Q. And that is the same stream that you saw, after the slide happened, coming over the top of the slide, when you came back there? A. Yes, sir.

Q. How wide was it at that time?

(Testimony of Charles Helsing.)

A. About the same thing—the same stream of water, I should judge.

Q. About 7 or 8 feet wide?

A. Yes, sir, I guess so—about.

Q. That was about the width—do you see the top of the slide there? A. Yes.

Q. When that picture was taken that stream wasn't there, was it?

A. It don't look like it.

Q. And you were there about five minutes after the slide?

A. It doesn't show any water in that picture at all.

Mr. HELLENTHAL.—That will be all from you.
(Witness excused.)

(Whereupon court adjourned until 10 o'clock to-morrow morning.) [262]

MORNING SESSION.

March 25, 1921, 10 A. M.

Testimony of Mrs. N. G. Nelson, for Plaintiff.

MRS. N. G. NELSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. You may state your name, please.

A. Mrs. N. G. Nelson.

Q. Where do you live, Mrs. Nelson?

(Testimony of Mrs. N. G. Nelson.)

A. Down on Front Street.

Q. In the town of Juneau? A. Yes.

Q. How long have you lived down there on Front Street? A. Two years.

Q. About where is your place on Front Street located with reference to Mr. Goldstein's store?

A. It was up above it, on the opposite side of the street from Goldstein's.

Q. You have lived there for how many years, did you say? A. Two years.

Q. Where do you live, downstairs or upstairs?

A. Upstairs, up above the store.

Q. From your rooms upstairs have you a free and unobstructed view of Mount Roberts and that portion of the sidehill upon which is located the flume of the Alaska Juneau Gold Mining Company?

A. Yes.

Q. And you have had that view there for about two years? A. Yes.

Q. Do you remember the day of the slide, Mrs. Nelson—that was the 2d day of January, 1920?

A. Yes.

Q. Were you here then? A. Yes, I was here.

Q. On that day did you observe any water on that sidehill in the neighborhood of this flume? [263]

A. Yes, I did; and I saw it at least two days ahead of the flood, too.

Q. Where was this water coming from, Mrs. Nelson?

A. Well, I didn't know in the morning where it come from, and I asked Mr. Nelson, my husband,

(Testimony of Mrs. N. G. Nelson.)

and he said it was from the Alaska Juneau flume that was up there.

Q. Take a look at this picture, Mrs. Nelson, and see if you can tell us where this water was coming from.

A. It is right under this side here—right here.

Q. That is where that little house is located?

A. Yes, a little house there, yes, and it was just coming down like a fall.

Q. Is this the place where you are pointing?

A. Yes.

Q. Now, you saw this water on the day of the slide, you say? A. Yes, I did.

Q. Did you see it before or after the slide?

A. I saw it before the slide, and I saw it right after the slide, a little while; then it was shut off—it stopped.

Q. About how long before the slide did you see it on that day?

A. On the day of the slide?

A. Yes, on the day of the slide—about how long before, as near as you can recollect?

A. I saw it when I got up in the morning—I watched that place there because ever since I knew it was from the flume I was always worried about it and I always watched it.

Q. Where were you at the time of the slide?

A. At the time of the slide I just went down to the store—I just took my baby in the room and I went down to the store, and I was right in the middle of the store when I heard a noise.

(Testimony of Mrs. N. G. Nelson.)

Q. What did you do then?

A. I went upstairs and grabbed the baby—I went upstairs and Mr. Nelson went out on the street.

Q. Did you look out of your window again then?
[264]

A. Yes, I looked from the roof—I had a good view from there, too.

Q. Did you then see any water coming down the hill?

A. Right then I did, yes—right immediately after.

Q. From your place did you see where the ground had broken loose? A. Yes.

Q. Did you see any water around there, Mrs. Nelson?

A. No, not around where the slide was, but I saw it up above, from where the flume was.

Q. And did this water run in the direction of the slide?

A. Yes, right down in that direction.

Q. Now, had you ever seen this water running out of this particular place, Mrs. Nelson, at any time before the slide?

A. Well, I saw it about two days before the slide—it started little and then grew bigger.

Q. You saw that water running there two days before the slide, you say? A. Yes.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. When you saw it two days before the slide,

(Testimony of Mrs. N. G. Nelson.)

Mrs. Nelson, there wasn't quite so much water, was there?

A. It wasn't quite so big, no, as towards the last.

Q. The water was running right down the hill towards Front Street—spouting out towards Front Street? A. Yes.

Q. And it was quite a wide stream?

A. Well, I wouldn't say exactly it was a wide stream, but it was big enough to notice, and of course as the days went by it grew bigger and bigger all the time.

Q. And you saw it several times during the day?

A. Yes, I did.

Q. As it rained more the stream got bigger?

A. What? [265]

Q. As it rained more the stream got bigger?

A. Yes, that is what it looked like.

Q. You say you saw it the first time two days before the slide? A. Yes.

Q. Did you see it several times that day?

A. What day?

Q. Two days before the slide?

A. Well, that was the day I noticed it, two days before the slide.

Q. That is when you first noticed it?

A. First noticed it.

Q. And you saw it several times that day, you say?

A. I don't know exactly if I looked out—how many times I noticed it—I wouldn't say, no, that was the first day.

(Testimony of Mrs. N. G. Nelson.)

Q. But you saw it several times as you looked out of the window? A. Yes.

Q. And it was running there when you looked out? A. Yes.

Q. And that was true on the first of January, the day before the slide, also, wasn't it?

A. Yes, indeed.

Q. Then it was raining, wasn't it?

A. Yes, sir.

Q. And it was a little larger than it was the day before?

A. Yes, sir; the first of January it was larger than it was the day before.

Q. Than it was on the last day of December?

A. Yes.

Q. And the 2d of January, that is the day that the slide happened, it was larger still?

A. It looked about the same to me on the first as the second.

Q. It was running at the same place? A. Yes.

Q. And you saw only one stream, Mrs. Nelson, didn't you? A. Just one stream. [266]

Q. You never saw more than one stream?

A. No, not at that place?

Q. That stream, you noticed where it hit the ground as it came down, didn't you? A. Yes.

Q. It would hit the ground 35 or 40 feet from where it came from the flume? A. Yes.

Q. Quite a ways down it struck the ground?

A. Yes.

Q. That is right, isn't it? A. Yes.

(Testimony of Mrs. N. G. Nelson.)

Q. You don't know how many feet, but quite a long ways—maybe from 35 to 40 feet?

A. It looked like a fall coming down.

Q. It looked like water falls coming down, didn't it?

A. Yes.

Q. That is what it looked like?

A. Yes.

Q. Did you ever see it before the 2d of January, or did you ever notice that stream there before?

A. Before the 2d of January?

Q. I mean did you ever notice it there before you noticed it two days before the slide?

A. No, I don't remember ever seeing it.

Q. But you saw it on those three days?

A. Yes.

Q. And you saw it several times during the days?

A. Yes, the last day before the first of January, I saw it several times then.

Q. The first time you saw it was early in the morning?

A. Yes.

Q. And then at different times during the day?

A. Yes.

Q. And that was true on the 2d day of January—you saw it about [267] 7 o'clock in the morning the first time?

A. Yes, when I got up, just about.

Q. That would be about that time?

A. Yes.

Q. And you saw it then several other times during the day?

A. Not the second during the day because it happened pretty early in the morning.

Q. But during the forenoon, I mean?

A. Yes.

(Testimony of Mrs. N. G. Nelson.)

Q. So you know it ran all forenoon—that is, it seemed as if it ran all forenoon to you?

A. Not on the 2d it didn't run all forenoon because it was shut off right after.

Q. I mean up to the time of the slide? A. Yes.

Q. And the first of January it ran all day, as near as you can tell now? A. Yes.

Q. And you saw it at different times during the day so it looked to you as if it ran all day?

A. Yes.

Q. From 7 o'clock in the morning until evening?

A. Yes.

Q. And the spout ran from the flume right down the hill towards Front Street? A. Yes.

Q. Spouted towards Front Street? A. Yes.

Q. And it was a stream from 3 to 4 feet wide, would you say? A. Maybe about that.

Q. You couldn't tell how thick it was, I suppose?

A. No—it was pretty big.

Q. It was pretty big, but you couldn't tell from where you stood just how thick it was?

A. No. [268]

Q. It looked like a waterfall? A. Yes.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. How long after the slide did the water keep on running, Mrs. Nelson, as near as you can tell?

A. I would say around 15 minutes after.

Q. Then it quit? A. Then it was shut off.

(Testimony of Mrs. N. G. Nelson.)

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) You don't know anything about the water being shut off, do you, Mrs. Nelson, that is just what you have been told?

A. No, but it was stopped—something must have stopped it.

Q. (By Mr. HELLENTHAL.) You don't know anything about anybody shutting the water off—you were not up there.

A. No.

Q. (By Mr. HELLENTHAL.) You were just in your house?

A. Yes, but I saw the water stop running.

Q. (By Mr. RODEN.) Have you ever seen it running out of that same place since?

A. No, never.

Q. (By Mr. HELLENTHAL.) You have never looked up there, Mrs. Nelson, since that you know of? A. Yes, many times.

Q. (By Mr. HELLENTHAL.) Couldn't it run there without your seeing it?

A. After the slide, you mean?

Q. (By Mr. HELLENTHAL.) Yes, there might be water running without your seeing it—you are not looking up there all the time?

A. Not out of the flume. [269]

Q. (By Mr. HELLENTHAL.) It might run without your seeing it? A. I have a good view.

Q. (By Mr. HELLENTHAL.) But I mean it might run without your seeing it?

(Testimony of Mrs. N. G. Nelson.)

A. No; whenever I looked up I never saw any water since the flood.

Q. (By Mr. HELLENTHAL.) You only saw one stream? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [270]

Testimony of W. J. Benson, for Plaintiff.

W. J. BENSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Mr. Benson, state your full name, please.

A. W. J. Benson?

Q. Where do you live, Mr. Benson?

A. Juneau.

Q. How long have you lived in the town of Juneau?

A. I lived in Juneau somewheres between four and five years.

Q. Were you in the town of Juneau on the 2d day of January, 1920? A. Yes, sir.

Q. That is the day of the slide? A. Yes, sir.

Q. You know where is located on the sidehill back of the town of Juneau, the flume and penstock of the Alaska Juneau Gold Mining Company?

A. Yes, sir.

Q. What did you do in the morning of the 2d of January, 1920, Mr. Benson?

(Testimony of W. J. Benson.)

A. I went from my house to the cold storage.

Q. I wish you would state to the Court and jury where your house is located.

A. My house is located on 5th and E Street, below the Catholic school.

Q. Where is the cold storage located?

A. The cold storage is down by the city wharf.

Q. How did you go down?

A. I walked down the street—down Gastineau Street, and I turned down by the Elks Club, and went on down the waterfront.

Q. At that time did you have any occasion to look up on the sidehill?

A. Walking along I glanced up, like I did at any time. [271]

Q. Did you see any water on the sidehill at that time?

A. I didn't see any water on the sidehill—I seen water coming out of the flume—the end of the flume.

Q. Whereabouts was this flume located?

A. At the further end, up where the little house is.

Q. How much water, about, did you see coming out of there, Mr. Benson?

A. I couldn't give any definite amount of water or anything like that, from the distance from the street to there, but there was a waterfall running.

Q. When you saw this you were on what we call Front Street?

A. Right beside the soda-water works on Front Street.

(Testimony of W. J. Benson.)

Q. How is the soda works located with reference to the Goldstein store?

A. It is kind of cater-cornered like—it is just up above and on the opposite side of the street—on the right-hand side of the street going down to the cold storage.

Q. Goldstein's store is on the left-hand side going to the cold storage? A. Yes.

Q. Do you know how long that water continued to run before the slide happened?

A. I couldn't tell you.

Q. Where were you at the time of the slide?

A. I was at home when the slide occurred.

Q. You heard the slide at home, did you?

A. I heard the fire-alarm.

Q. Can you give us any idea as to how long it was from the time you had seen that water coming out of this particular place until you heard the fire-alarm?

A. To the best of my knowledge it would be probably about an hour, because it was ten o'clock when I left my house to go to the cold storage.

Q. Where was this water running to that you saw coming out of this— [272]

A. Just shooting out over the flume and shooting down just like a waterfall—it was shooting over a level place, like, and shooting out and dropping down.

Mr. RODEN.—You may cross-examine.

(Testimony of W. J. Benson.)

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That was maybe about a quarter after ten in the morning, you think, Mr. Benson?

A. When I went down to the cold storage, yes, sir.

Q. When you were there? A. Yes, sir.

Q. How wide was the stream, Mr. Benson?

A. I couldn't tell you that.

Q. I mean approximately.

A. I couldn't give you any idea.

Q. Three or four feet wide, maybe?

A. I didn't take that much notice.

Q. You didn't specially notice it?

A. I noticed the water coming out of the flume.

Q. It was spouting out towards Front Street?

A. No, not spouting out towards Front Street at all—it was spouting out towards Gold Creek—shooting out of the end of the flume and falling down.

Q. When did you have a talk with Mr. Roden about this thing?

A. I didn't have any talk with Mr. Roden.

Q. Who did you talk to about this?

A. Nobody.

Q. Did you ever talk to anybody about it?

A. Only passing the remark about seeing this water, in my place of business.

Q. Didn't you ever say anything to the men on the other side about what you knew about this case?

A. No, sir. [273]

Q. Not at all?

(Testimony of W. J. Benson.)

A. No, sir; if I had I would have been called in the other case.

Q. You just by chance came up here to testify?

A. No; some one who heard me in the poolroom told them what I said.

Q. They put you on the witness-stand without talking to you? A. Yes, sir.

Q. Do you mean to tell me that Henry Roden put you on the witness-stand without asking you what you knew about it?

A. He came to see me, of course.

Q. How thick was this stream?

A. I couldn't tell you, I told you.

Q. You didn't pay enough attention to it to tell?

A. No, sir.

Q. How wide this stream was?

A. It was quite a ways from the hillside to the street.

Q. You only saw it was like a waterfall falling and hitting the ground? A. Yes, sir.

Q. How big would you estimate it was before it hit the ground?

A. I couldn't estimate you any distance.

Q. Would it be 45 feet, 60 feet, 75 feet or 100 feet? A. It wouldn't be that high.

Q. About how high?

A. I couldn't give you any definite answer as to how high it would be, but making a rough estimate it would be 12 feet, maybe, or 14 feet.

Q. It came off like it was coming from a level place, shooting down?

(Testimony of W. J. Benson.)

A. It came out like it was coming from this chair here and dropped down.

Q. That is the way it looked to you? A. Yes.

Q. And you couldn't tell how wide it was or how thick it was? [274] A. No.

Q. You didn't pay enough attention to it?

A. No; I glanced up on the hillside walking past the same as I would to-day, if I was walking by, look up and just notice it—it was raining pretty hard that day and I looked up on the hillside and seen this water shooting out of the flume—that is all I know about it.

Q. Do you know where the portal of the tunnel is there? A. Yes, sir.

Q. Where was the water shooting out with reference to that portal? A. Below the portal.

Q. About how many feet?

A. I couldn't tell you that.

Q. Anywhere from 5 to 15 feet?

A. It is quite a while now since I was up on that sidehill.

Q. It would be 5, 10, 15 or 20 feet—something like that? A. A little farther than that.

Q. It would be in that neighborhood, anyhow.

A. It is somewheres around there—I couldn't give you the distance.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) Now, about your being a witness here, Mr. Benson; I came down to your poolroom about three days ago, didn't I, and talked to you about this? A. Yes.

(Testimony of W. J. Benson.)

Mr. HELLENTHAL.—I object to that—if he wants to impeach his own witness—

The COURT.—It is not redirect examination.

Q. (By Mr. HELLENTHAL.) It is a fact that you talked to Henry Roden about this case?

A. He came to me himself—he came and asked me if I had seen it.

Q. (By Mr. HELLENTHAL.) And you talked to him about it? A. I told him what I had saw.

Q. (By Mr. HELLENTHAL.) It is really true that you talked to him [275] about it?

A. Yes.

Mr. HELLENTHAL.—All right; that is all.

(Witness excused.)

Testimony of George P. Torkleson, for Plaintiff.

GEORGE P. TORKLESON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name?

A. George P. Torkleson.

Q. What is your business? A. Carpenter.

Q. How long have you lived in the town of Juneau, Mr. Torkleson?

A. Going on four years.

Q. Were you in the town of Juneau the day of the slide, January 2d, 1920? A. Yes, sir.

Q. Where did you live at that time?

(Testimony of George P. Torkleson.)

A. 515 Front Street, in Sorby's place.

Q. Did you leave the place there at any time the day of the slide?

A. I left it after the slide occurred.

Q. How long after the slide occurred?

A. Well, I don't know just exactly how long after the slide occurred because what attracted my attention to it, I happened to stand in front of the stove making some breakfast and I seen two fellows running to the fire-alarm box and turn in the alarm, so I questioned them and they told me it was a slide, and I went right out.

Q. Did you hear anything of the slide—did you hear the slide yourself?

A. I didn't hear it. [276]

Q. Did you hear the fire-alarm?

A. I heard the fire-alarm because I was on the street and the fire-alarm was right at my window, and I seen these fellows turn in the alarm.

Q. Were you at the slide before the fire department got there, or after?

A. I was at the slide before the fire department got there.

Q. When you got there did you see any water anywhere?

A. Well, I didn't stop to notice anything like that because I happened to look up the hill and I seen one lad trying to get himself out up there.

Q. You paid no attention to anything except the people that might be in the wreckage?

A. Yes, sir.

(Testimony of George P. Torkleson.)

Q. Are you acquainted with the flume and the penstock of the company? A. Yes, sir.

Q. You have had plenty of opportunity to observe that? A. Oh, yes.

Q. Do you know where the penstock is located up there? A. Yes.

Q. Where is that located?

A. Right below the hill—I don't know just exactly from the tunnel down whereabouts it is.

Q. Do you know where the change house was up there—what they call the change house?

A. No, I haven't noticed it enough to know that.

Q. I show you this picture here, Exhibit "N," and ask you to show about where that penstock was located that you are speaking about.

A. Right in here some place.

Q. This has been identified here as the change house.

A. I don't know enough about mining to know it.
[277]

Q. Have you ever seen any water coming out of this place that you indicated there? A. Yes, sir.

Q. When did you see that?

A. Two days before the slide, when I first noticed it.

Q. How much water was coming out of there at that time?

A. I couldn't exactly tell because I wasn't paying any attention to that.

Q. Where did this water go to?

A. It seemed to go in the brush.

(Testimony of George P. Torkleson.)

Q. How did you happen to see that a couple of days before the slide?

A. Well, I had been eating heavy food and was nervous like, and I usually lots of times take a walk up through the hills some place for exercise—I wasn't doing much during those days.

Q. Where was that where you saw this water coming out of this penstock?

A. Why, right at Gastineau Avenue, just about in front of it.

Q. Gastineau Avenue, in front of the place, and that was about two days before the slide happened?

A. Two days before the slide.

Q. You cannot tell how much water was coming out of there at that time? A. No, I didn't notice.

Q. Have you any idea as to the size?

A. I am a poor judge of water flowing—I was at a distance—I wasn't up to see what it was.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. I wish you would explain to me how that stream looked, as it came out; how wide was it?

A. I never noticed the width of it.

Q. Can you give me some idea of how wide it was? [278]

A. I couldn't very well, because I see the water come there—I don't know how much there was dropping out of there—I could not say.

Q. You couldn't say that?

(Testimony of George P. Torkleson.)

A. No, I couldn't say that.

Q. Where did it come from, the top of the flume, the bottom of the flume, or where was it?

A. From the top of the flume—flowing over.

Q. It was flowing over the top of the flume?

A. Yes.

Q. And the stream was running down and hitting the ground and going into the brush?

A. Yes, come shooting right over and hit right in the brush.

Q. About how far down did it shoot, Mr. Torkleson? A. I couldn't tell you that.

Q. I mean about how far—do you know about how many feet—about?

A. From the drop of the water to the ground, you mean?

Q. Where it dropped from the flume to the ground.

A. I would judge about 10 or 15 feet, maybe, what it looked to me—the height of the thing, as far as I noticed.

Q. You didn't notice it particularly? A. No.

Q. You couldn't tell how wide the stream was?

A. No.

Q. Whether it was a big stream or a small stream?

A. No; it was a pretty good-sized stream.

Q. How much water you don't know?

A. No, not just how much water there was in it—it is more than the ordinary rain around the hills up there—I noticed that.

Q. That was two days before the slide?

(Testimony of George P. Torkleson.)

A. That was two days before the slide.

Q. It was raining then, wasn't it—raining pretty hard?

A. Misting. [279]

Q. And it was pretty warm, wasn't it?

A. It was misting.

Q. And it was pretty warm, wasn't it?

A. I didn't notice it was pretty warm—it was raw and damp—it didn't feel very warm to me.

Q. How many streams did you see—only one?

A. Only one stream.

Q. And it was shooting out towards Gastineau Avenue?

A. Yes; and it seemed to be in the direction of the rest of the flume, running into the box there and shooting over.

Q. It came right over the top of the flume and on to the ground, that is all you know about it?

A. That is all I know about it, yes, sir.

Q. You don't mean to say that you know the location of those things on the ground yourself—you know them on the picture only?

A. Well, I know them from what I saw on the avenue and from the street afterwards—that is all I know.

Q. And you have had them pointed out to you, where they are on the picture?

A. I see them on the picture as well as I saw them on the avenue.

Q. When did you see this picture before, Mr. Torkleson?

(Testimony of George P. Torkleson.)

A. When he showed it to me just a minute ago.

Q. You have seen it before that, haven't you?

A. I seen it this morning; yes.

Q. You had it pointed out to you where it was on the picture?

A. He asked me just about where it was and I showed him.

Q. You pointed out the place where the flume was? A. Yes.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. You pointed it out yourself?

A. You asked me where it was and I pointed it out.

Mr. RODEN.—Yes, if you hadn't you wouldn't be here. That is all. [280]

Q. (By Mr. HELLENTHAL.) Was that the exact point you pointed to now?

A. I might have had my finger on a different spot, but right around it.

Q. (By Mr. HELLENTHAL.) In that neighborhood? A. In that neighborhood, yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of J. L. Gray, for Plaintiff.

J. L. GRAY, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Testimony of J. L. Gray.)

Direct Examination.

(By Mr. RODEN.)

Q. You may state your name, please.

A. J. L. Gray.

Q. Where do you live, Mr. Gray? A. Juneau.

Q. How long have you resided in the town of Juneau? A. 17 years.

Q. What is your business?

A. Manager of the Alaska Soda Bottling Company.

Q. Were you in the town of Juneau on January 2, 1920, Mr. Gray, that is the day of the slide?

A. Yes, sir.

Q. Where were you at the time of the slide?

A. Sitting in my office.

Q. Where is your office located with reference to Goldstein's store?

A. It is just a little below Goldstein's store, on the opposite side of the street.

Q. You can see the Goldstein store from your office? A. From the front window, yes, sir.

[281]

Q. What attracted your attention to the slide first, Mr. Gray?

A. I think it was when the street crashed through up there, Gastineau Avenue.

Q. What did you do then?

A. I started to run.

Q. Where did you run to?

A. I started to run toward the city dock.

Q. For what purpose?

(Testimony of J. L. Gray.)

A. Get out of the way of the slide.

Q. Did you look up on the sidehill at any time?

A. I was watching this—there was a big two-story house coming down and I was watching this house all the time as I was running.

Q. Did you see any water coming down there at that time?

A. Not at that time I wouldn't say that I did.

Q. When did you see the water come down, Mr. Gray?

A. I saw some water coming down right after the slide had settled. I went through an alleyway there around to the back and I saw some water coming down through under the steps there coming down from the Windsor apartments.

Q. How much water was coming down there?

A. There was quite a little stream coming down.

Q. Do you know where that stream was coming from? A. No, sir.

Q. How high up the hill did you see that stream?

A. I wouldn't say, Mr. Roden—I wouldn't say that I noticed it coming down above where the steps are.

Q. What did you do, if anything, concerning this water?

A. The first thing that I did after this house hit at the bottom, I saw a man down by the water hydrant there by Jim Connor's, and I hollered to him to turn the fire-alarm in, and then we heard some moaning and some screams of people around in the back there, and I went around in the back

(Testimony of J. L. Gray.)

to see what was going on; then some one asked me to call up the Alaska Juneau and asked me to tell them to turn off the water, which I did. [282]

Q. To turn off which water?

A. To turn off the water in the flume, I suppose; and Mr. Blossom told me that they had already turned off the water.

Q. Who was Mr. Blossom?

A. Mr. Blossom at that time was one of the employees of the Alaska Juneau Mining Company.

Q. Did he answer the telephone? A. Yes, sir.

Q. Do you know how long the Goldstein store, that is, not this present building, but I mean how long the Goldstein property there had been occupied, about?

A. Which property do you mean?

Q. The one that Izzy Goldstein is in now.

A. Oh, in his store?

Q. Yes,—I don't mean this particular store building, but I mean the lot—it may not be the same building.

A. I think that building was built in 1905 or '06, I am not sure which.

Q. Was it there when you came here?

A. I wouldn't say that—Mr. Goldstein was living in a house that is torn out, when I came here first.

Q. What I am trying to get at is this, Mr. Gray: was the property in there, the real estate, that portion of the hill there, occupied by people—that is, occupied by buildings, when you came here?

(Testimony of J. L. Gray.)

A. Yes.

Q. That portion of that sidehill there has been settled for the last 17 years to your knowledge?

A. Yes, sir.

Mr. RODEN.—That is all. [283]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. The settlement that was on that sidehill when you came here consisted of a few cabins, didn't it?

A. Yes, sir.

Q. There were no houses up there such as there are now—no big houses?

A. There were not so many houses up there as there are now, but there were cabins up there.

Q. Izzy Goldstein had a store, or his folks did?

A. Yes, sir.

Q. And that was situated where the store is now, or near it? A. Yes, sir—near it.

Q. I wouldn't say just exactly the same, but situated right near it? A. Yes, sir.

Q. Right next door to it, or I think the old building was moved, wasn't it, for the new one?

A. I don't know.

Q. The old store was there first? A. Yes, sir.

Q. And the new building was built afterwards?

A. Yes, sir.

Q. On the hillside there were some small cabins, but no big houses such as there are now?

A. I couldn't say as to that.

Q. The big houses have been built in the last five, six, seven or eight years?

(Testimony of J. L. Gray.)

A. Like the Windsor, yes. The cabins of old man Lund were there.

Q. Yes, they were there when you came?

A. Yes.

Q. And they have put up the larger houses since? A. Yes.

Q. And the larger houses have been built in the last five or [284] six years—something like that?

A. Something like that.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. And the town wasn't nearly as big when you first came as it is now, was it, Mr. Gray? A. No.

Q. Or as it was three or four or five years ago?

A. It wasn't as large when I came, no.

Q. But all along there it was occupied by stores and the sidehill was occupied by cabins?

A. Yes, sir.

Q. Were there some other stores right in there alongside of Goldstein's store?

A. I wouldn't say as to that, Mr. Roden.

Q. Didn't Decker have a store down there—Decker Brothers?

A. I don't remember whether Decker had a store down there or not.

Q. It may have been before your time?

A. Yes.

Mr. RODEN.—That is all.

(Testimony of J. L. Gray.)

Recross-examination.

(By Mr. HELLENTHAL.)

Q. Decker Brothers had a store up across from the First National Bank?

A. Yes, where Ross and Higgins was.

Q. The old Decker store, that was uptown from Izzy Goldstein's?

A. I don't know any thing about it.

Q. Were you here when those slides occurred in that neighborhood? A. Former slides?

Q. Yes.

A. The first slide I remember in that neighborhood was the slide [285] down opposite the saw-mill about six or seven years ago, I believe it was.

Q. You don't remember the slides in the neighborhood of Goldstein's store?

A. No, sir; I think that was before my time.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Hans Berg, for Plaintiff.

HANS BERG, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

Q. Mr. Berg, what is your business?

A. Carpenter.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

A. About 8 years.

(Testimony of Hans Berg.)

Q. And have you followed the carpentry business pretty well during that time? A. All of the time.

Q. Are you acquainted with the flume and penstock of the Alaska Juneau Gold Mining Company located on the hillside above the town of Juneau?

A. Yes; I built the penstock, or helped to build the penstock.

Q. You built that penstock? A. Yes.

Q. Can you give us any idea as to the time when you built it? A. It was in the fall of 1916.

Q. I wish you would give us a rough description of the dimensions of the penstock—how it was built.

A. Just the exact dimensions I couldn't give because it is so long ago I don't remember the measurements of it, but it is [286] about 12 by 12—that is the square area, and it is 12 or 14 feet deep—it was considerably deeper than it was wide, I think.

Q. You think it was about 12 to 14 feet deep?

A. Yes.

Q. And about 12 by 12 otherwise?

A. Yes, that is about it—I couldn't say exactly.

Q. Are you acquainted with what has been called here the trommel screen that was in the penstock?

A. Yes; I installed that screen.

Q. Where is that located with reference to this penstock building?

A. Well, it is up on the top—in the top part of the penstock.

Q. It is in the upper part of the penstock?

A. Yes, in the upper part of the penstock, located

(Testimony of Hans Berg.)

right over the penstock, so to say.

Q. Does any device lead out of this penstock to carry water to different places?

Q. Yes, there are pipes.

Q. Where are these pipes located with reference to the screen? A. The trommel screen?

Q. Yes,—do you think you could draw a little sketch on the blackboard here so the jury can understand it, perhaps, a little better?

A. I will try. The flume went about here, and here is the penstock. This here, you see, is downhill—the pipe that went to the mill—I believe was a 30-inch pipe—come out about here—this place here is supposed to be square with the hillside, as the pipe is laid; then comes a smaller line, a little lower—it is a high pressure pipe for a water system for the city; and then here—I am not positive—I think the boiler feed pipe, that is a drain-pipe, coming there, just on the bottom. That is as close as I remember—it might be here or it might be there, I am not positive of that. That flume laid in there—the flume might come a little down there—I don't remember—it is four or five years ago and I cannot remmeber so close. [287]

Q. Try to locate in there this screen you have spoken about.

A. The screen comes in here. The screen goes down there—it was circular, to direct the water into the trommel—it was screwed on there.

Q. Where is the tunnel?

A. The tunnel comes over and extends out this

(Testimony of Hans Berg.)

way. This is just on the end.

Q. The trommel would be running this way?

A. Yes.

Q. And revolving? A. Yes.

Q. The water would come through and fall down in here? A. Yes.

Q. And flow into these different pipes then?

A. Yes.

Q. Were there any spillways connected with this penstock, Mr. Berg?

A. Not at that time. The screen was installed in 1918.

Q. Was there any spillway provided up to that time?

A. I don't know about that time. We only provided for a little tin chute that should take rubbish and whatever might be in the water so that it wouldn't block up the pipes.

Q. You know where the portal of the tunnel is up there? A. Yes.

Q. Is there any spillway between that tunnel and the penstock?

A. There wasn't any at that time except to clean out mud, gravel and dirt in the bottom of the tank there close to the portal.

Q. That was a clean-out tank,—that wasn't to take care of any water?

A. No, it wasn't at that time.

Q. It was a clean-out tank or gravel tank, and was just to take care of the rocks and material that might come through? A. Yes.

(Testimony of Hans Berg.)

Q. And sand. Now, suppose that screen would get blocked up in any way, for any reason, where would the water that was coming through the flume go to? [288]

A. Well, likely it would go towards the tin chute.

Q. Which tin chute? A. That one at the end.

Q. Why would it go through that tin chute?

A. Because the screen was slightly slanted—it was narrower at the receiving end than it was at the other—that is providing for the rubbish to go out.

Q. There would have been no other place for the rubbish to go out of that penstock except through that chute? A. And overflow at the portal.

Q. Yes, and overflow at the portal, but say the service pipes became clogged up or the screen became clogged up, the pipes wouldn't carry off the water, and if the screen is blocked up of course the water would never get to the pipe, would it?

A. No,—of course more or less would go through the pipe—it wouldn't be entirely clogged up, I don't suppose.

Q. Some might go through, but where would the water go to in that event?

A. The lowest point would be where that rubbish chute was—that was the lowest point in the tank.

Q. That is the lowest point in the tank and that is where the water would come out of it?

A. Yes.

Mr. RODEN.—You may cross-examine.

(Testimony of Hans Berg.)

Cross-examination.

(By Mr. HELLENTHAL.)

Q. There was a rubbish chute put right below the trommel screen to carry out the rubbish that the trommel screen took out of the water, Mr. Berg?

A. Yes.

Q. That is right, isn't it? A. Yes.

Q. And that screen would never get so clogged up that all of the [289] water would run over it—that would be impossible, wouldn't it?

A. No, I wouldn't say that—there would always some water go through it.

Q. If the screen would be clogged up some water would run out of the chute, that is right, isn't it?

A. Yes.

Q. You know there was a tank at the mill?

A. Yes.

Q. And that takes care of the overflow?

A. Yes.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. You know the pipe-line that went from the penstock to the mill? A. Yes.

Q. Do you know whether there is any gate of any kind in that pipe-line?

A. There is some kind of valves provided for the city fire system—that is all I know of.

Q. I mean a valve in the big pipe-line?

A. Well, there is a valve at the so-called adminis-

(Testimony of Hans Berg.)

tration foundation—I don't know what really that is for—I think there is a big valve there.

Mr. RODEN.—That is all.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. That valve has a padlock on it, hasn't it, Mr. Berg?

A. Yes, it was locked.

Q. That valve that you were speaking of is on the city pipe?

A. No, I am not positive—I think it is in the big pipe.

Q. The valve in the big pipe has a padlock on it, hasn't it?

A. I know there is a valve on it—I never had no occasion to look into that—I know there is a valve there. [290]

Q. That pipe is always kept open and the water runs into the mill tank?

A. Yes, I presume it is.

Q. And that big pipe that runs to the mill tank—that is never shut and that water runs down to the mill tank, and that is where the overflow is, isn't it?

A. There is an overflow there, yes.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) Do you know whether or not there is a big valve in that big pipe anywhere?

A. There is a valve there—I am not positive whether it is the big pipe-line.

Q. (By Mr. RODEN.) If there is a valve and if

(Testimony of Sim Frieman.)

the valve is closed the water is not always running through the pipe-line, is it? A. No.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Sim Frieman, for Plaintiff.

SIM FRIEMAN, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. State your name, Mr. Frieman.

A. Sim Frieman.

Q. Where do you reside? A. Juneau.

Q. How long have you resided in the town of Juneau, Mr. Frieman? A. 21 years, off and on.

Q. On the 2d day of January, 1920, the day on which the slide occurred, were you in the town of Juneau? A. Yes, sir. [291]

Q. Did you go down to the slide, Mr. Frieman?

A. I did.

Q. About where were you when you first heard about it?

A. I was working at C. W. Young Company.

Q. How was your attention attracted to the slide?

A. Well, at that time we had an alarm system in there connected with the regular fire-alarm system, and when I heard the alarm I got the number and run down that way.

Q. What position did you occupy with reference

(Testimony of Sim Frieman.)

to the fire department in the town of Juneau?

A. Chief of the fire department.

Q. And the alarm was practically turned right into your office, and what did you do then, Mr. Frieman?

A. Run down there to see where the fire was, and saw the slide.

Q. You ran down there just as fast as your legs could carry you, I suppose?

A. Yes, I think I did.

Q. As a fireman and chief—and what did you do there, Mr. Frieman? A. I saw the slide.

Q. Had the slide finished—was it over or was the mass still moving?

A. I couldn't say whether the slide was over or not—I couldn't say that one way or the other. All I remember is that we got there and we started right in working helping to get the people out.

Q. The time you got down there did you see any water anywhere over on the slide area?

A. The water was everywhere—that is, water and mud.

Q. Was there any water on the slide area, where the dirt had moved out?

A. Well, I don't know that I noticed the water coming from there.

Q. Do you know where this water was coming from that was coming over this slide area?

A. I saw it coming down the gully.

Q. That is the little gully this side of the slide, which would [292] be the north?

(Testimony of Sim Frieman.)

A. It is the main gully there, wherever the slide came down.

Q. You mean the gully that was caused by the slide? A. I suppose that is it.

Q. That is the gully; you mean that water was coming through that gully that had been caused by the slide, and where this water was coming from you cannot now tell? A. No.

Q. How long did this water continue to run, Mr. Frieman?

A. Well, my attention was brought to it after we had been working there. I don't know how long we had been working, but somebody come to me and says, "Why don't you telephone to the Alaska Juneau to shut off the water?" I went over—I think I went to Winter and Pond's, and phoned to the Alaska Juneau—who I phoned to I don't know—phoned down to the main office and asked them to shut the water off.

Q. Have you any idea how long it took for the water to quit then?

A. No, I don't remember, because I went right back to work then.

Q. Your attention was drawn to other matters?

A. To help try to get the people out.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. When you first came there, Mr. Frieman, you saw no water running over the top of the slide where it had broken loose?

(Testimony of Sim Frieman.)

A. No, because I never even looked.

Q. And it was a matter of probably 10 or 15 minutes after that when you saw water coming from that direction?

A. I couldn't say how long it was—I know I had been working there a while, but how long I couldn't say.

Q. And it was some time after you had been working that you telephoned? A. Yes.

Q. You don't know how long? [293]

A. No, I couldn't say—during the excitement I don't know how long I was working.

Q. You were excited and you were busy?

A. I wasn't excited—I was paying attention—

Q. You were busy, anyway—you had something to occupy your mind and the time as to a matter of minutes or hours you didn't pay any attention to?

A. No, I couldn't say one way or the other.

Q. Do you remember, Mr. Frieman, the slides that came down there in previous years in that neighborhood? A. Yes, I believe I have.

Q. What slides did you see there in previous years?

A. I cannot remember the dates of them but I remember there were slides there before.

Q. Right in that same neighborhood?

A. In the same neighborhood.

Q. Do you remember a slide occurring where Mr. Goldstein's building is there?

Mr. RODEN.—We object to that question as not cross-examination.

(Testimony of J. J. Connors.)

The COURT.—Objection sustained.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of J. J. Connors, for Plaintiff.

J. J. CONNORS, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Your name is J. J. Connors? A. Yes, sir.

Q. Where do you live, Mr. Connors?

A. In Juneau, on Gold Street.

Q. You have a place of business on Front Street?

[294] A. Yes, sir.

Q. About where is that located with reference to the Goldstein store?

A. About a hundred yards below Goldstein's store.

Q. And on the opposite side of the street?

A. On the opposite side of the street.

Q. Were you down in your place of business, Mr. Connors, on the day of the slide, at the time the slide happened?

A. I was in my place of business, yes, sir.

Q. How was your attention called to the slide?

A. I was sitting in my office in my place there of business and I heard a noise—don't know—kind of a crashing noise—I didn't quite understand what

(Testimony of J. J. Connors.)

it was, and I got up and went into the garage part of the place, and a fellow hollered out and said, "Look at the slide."

Q. Who was it?

A. I don't know who it was that hollered—he was running along, hastening down towards where the slide was, and I looked and I saw the back part of Izzy Goldstein's place crashing in, you know—the lumber kind of turning around, and I went down—walked down—I didn't run—I saw everybody running there in kind of a hurry, and I saw everything going, and I went down to where the slide was, and about that time the buildings were crashing in.

Q. Did you see any water up there anywhere?

A. Yes; the water and mud was coming out on the street then when I got there.

Q. Where was this water and mud coming from?

A. Coming down the hill; when I got there I went up the stairs because I heard a lady hollering up there, and there was quite a few men there, and we rushed up the stairs to try to save her, and when I got up there there was a woman, she was down in the mud and water, and she was getting herself out—that was at the first flight of stairs—the long flight pretty near opposite the Windsor Apartments; and there was a boy, looked like a [295] young man, also there, and there was two fellows got hold of him and took him out of this mud, and I went over to help those fellows and this lady was getting out of the mud too.

(Testimony of J. J. Connors.)

Q. You cannot tell where this water was coming from?

A. It was coming right down the hill above Goldstein's, coming right straight down the hill there. While we were there somebody hollered from the street and told us to look out, there was another slide coming down, and I looked up and I saw a lot of rocks and mud and stuff coming from as far up as where the ground was broken on the side of the hill, and we all ran down on to the street, so I went over and told the mayor, Dolly Gray was mayor—I told him he had better go—we could see the water coming over the flume, so I told him he had better go and tell the Alaska Juneau to shut off the water.

Q. This water that was coming from the flume, was that the water that was coming over the slide area?

A. There was no other way for it to come except on down the hill.

Q. Who was working for you in your shop that morning?

A. Billy Neiderhauser and George Jorgenson were the two men that were working in there.

Q. Did George Jorgenson go down there with you?

A. No, not until I went down to the shop—I went down to the shop and told the boys, in fact.

Q. And then he went down?

A. Yes, he went down and tried to help take out some of these fellows.

(Testimony of J. J. Connors.)

Q. So he went down after you had been down to the slide? A. Yes, sir.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. The first time you observed the water coming from clear off the top was the time that somebody hollered, "Look out for another slide"? [296]

A. The water was coming all the time—the water was coming when this woman was in there—she was in the water and mud at the time.

Q. I know there was water in the back part of Goldstein's store.

A. Water coming down the hill.

Q. But the first time you saw it coming down there was when you heard some one holler—coming from way up at the top where the thing had broken loose?

A. The water was coming all the time down the hill—all the way down the hill.

Q. I know, but that is the first time you saw it up on top?

A. I saw it when I started to go upstairs.

Q. That is coming down over the top of the—

A. Coming down over the ground where the slide started from.

Q. You saw quite a stream of water, didn't you, Mr. Connors, coming over the top there, later on when you looked up there, when you saw it coming from the Alaska Juneau flume?

(Testimony of J. J. Connors.)

A. It wasn't any more of a stream that at any other time, Mr. Hellenthal.

Q. Now listen—when you looked up there and saw it coming from the Alaska Juneau flume, there was a pretty big stream coming over the apex of the slide, wasn't there?

A. Looking from my place, looking at the flume, you couldn't tell how much water was coming over the flume, but you could see water coming over the flume.

Q. I am talking now about the top place where the slide had broken loose. A. Yes.

Q. There was quite a stream of water coming over there afterwards?

A. I didn't notice any more water coming afterwards than I did any other time I looked up there.

Q. When this picture was taken the stream you saw coming over the top of the slide—I am directing your attention to the upper part where the slide broke loose—referring to [297] Exhibit "O," when the picture, Exhibit "O," was taken the stream that you refer to as coming over the apex or top of the slide where it had broken loose wasn't running?

A. It was coming all the way from here on down, and where the ground was broken it was coming on down here.

Q. That stream isn't on that picture, is it?

A. The stream—what do you mean?

(Testimony of J. J. Connors.)

Q. That is coming over the top or apex is not on that picture, is it?

A. There is no water shows here like it was there because you can't tell whether it is water or what it is—it wasn't much of a stream—it was mud and water.

Q. But afterwards you saw quite a big stream of water running down there, didn't you?

A. I didn't see any more than I did the first time.

Q. That picture doesn't show the water—the water wasn't running when that picture was taken, that you are now testifying about?

A. I don't know anything about this picture.

Q. You can look at the picture, can't you?

A. Yes.

Q. Well, look at it.

A. I can't tell whether this is water or mud. When mud and water are running together you cannot tell what it is in a picture.

Q. Don't you know there is mud oozing out of there in that picture?

A. You can make a cut in the ground anywhere and it will look like mud in a picture.

Q. Don't you see mud oozing out of that bank?

A. No; I cannot tell it from any other broken ground on the side of the hill.

Q. And so the first time, Mr. Connor, you looked up at the top where the slide had broken loose you saw quite a stream of water?

A. When I first went down to the slide.

Q. That was the first thing you did? [298]

(Testimony of J. J. Connors.)

A. To see where this was coming from.

Q. That was the first thing you did?

A. Certainly.

Q. How much water did you see running there at that time, Mr. Connor?

A. I couldn't measure the flow, but there was water all over that part of the ground that was broken, and it was coming down in all directions; and the space from the stairs that I went up to cross to where this woman was in the mud, I would judge it would be 40 or 50 feet.

Q. And that was all covered with water?

A. That was all covered with water and mud and rocks and pieces of lumber and everything that would make a wreckage.

Q. And that is the water that you noticed when you looked up?

A. That was the water that was coming down the hill.

Q. That was the water you saw when you first went up there? A. Certainly.

Q. At that time you didn't see where the water came from, did you?

A. No, I didn't see where it came from until I came out and I looked up the hill and I saw the water coming over the flume.

Q. Then you saw it coming over the top where the slide had broken loose?

A. It was coming right down the road of the slide, yes.

(Testimony of J. J. Connors.)

Q. And there was a big stream of water there at that time, wasn't there?

A. How it got from the flume to the slide, I couldn't tell, because I wasn't up there, and I couldn't see from where I was the track of the water.

Q. All you could see, there was water on top, and there was some kind of a stream coming over where it broke loose?

A. Yes; you couldn't judge, Mr. Hellenthal, how much water was there.

Q. I know, but I am asking you if there was water on top, and some kind of a stream coming over where it broke loose? [299]

A. There was quite a lot of water and mud coming down all the way along.

Q. Of course between the flume and the slide you couldn't see where the water was running?

A. No, nobody could from down there.

Q. Now, that was really the first time, Mr. Connors, that you saw where the water was coming from, and that was in the neighborhood of where you were, down on the steps?

A. Yes, I looked up because for that water to be coming down there, a person would naturally look upwards.

Q. Before that time you didn't know anything about water, and you were not looking for water, isn't that the idea?

A. It wasn't any of my affairs—I wasn't thinking anything about it at all. I wanted to see what

(Testimony of J. J. Connors.)

the cause of the trouble was and see if I could do any good.

Q. You went down to help take the people out of the wreckage? A. Yes.

Q. And you went to work?

A. I didn't do much. Mr. Frieman came down and took charge of things. I said, "If I can be of any help, I will be glad to help," but I thought it was better to put it under some head to handle it.

Q. You were trying to do whatever you could to get the people out? A. Yes.

Q. You heard the woman yelling and you were looking for the yelling and not for the water?

A. Yes; and I was looking out for myself, so I wouldn't get caught in any slide.

Q. Then after you went out in the street, when they talked about a second slide, then you saw the dirt and rubbish and all of that—

A. Yes; it was coming when we went out, dirt and mud and water all coming down.

Q. And that is the time the water was coming down? [300]

A. There was no heavy brush coming down.

Mr. HELLENTHAL.—Oh, that's all.

Redirect Examination.

(By Mr. RODEN.)

Q. How long would you say it took you to get from your shop to the scene of the slide, Mr. Connors?

A. As long as it would take a man to walk 300

(Testimony of J. J. Connors.)

feet, or a hundred yards—somewhere along there—I don't know how long.

Q. Have you any idea as to how long this water continued to run?

A. The water was shut off at 7 minutes to 12 by my watch—that is, it stopped running over the flume.

Mr. RODEN.—That is all.

(Witness excused.) [300½]

Testimony of E. C. Guerin, for Plaintiff.

E. C. GUERIN, a witness called on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Will you please state your full name?

A. E. C. Guerin.

Q. What is your profession, Mr. Guerin?

A. Surveyor of the Land Office.

Q. How long have you been engaged in this profession, Mr. Guerin?

A. Off and on for the last 21 years.

Q. How long have you been with the United States Land Office?

A. Permanently since the spring of 1917.

Q. On the 2d day of January, 1920, were you in the town of Juneau? A. I was.

Q. That is the day on which the slide occurred?

A. Yes, sir.

(Testimony of E. C. Guerin.)

Q. Can you tell us where you were, Mr. Guerin, at the time of the slide?

A. I was on the street somewheres near the Coliseum Theater—somewheres along there. I had been down to the Estebeth—I was going to Sitka that night—and was coming back.

Q. Will you please state about how far it is from the Coliseum Theater to the Goldstein store?

A. I couldn't state exactly.

Q. No, but about?

A. I suppose it is a hundred yards or better—I really don't know—I never measured it—never counted the blocks, even.

Q. It is a couple of blocks or so?

A. I don't know just how far it is.

Q. The only reason I ask you the question, some of the gentlemen are not very well acquainted around the town of Juneau.

A. It is maybe a hundred yards—I couldn't say the exact distance. [301]

Q. You were at the Coliseum Theater?

A. Somewhere near the Coliseum Theater—within a few feet of it.

Q. What attracted your attention to the slide?

A. The noise.

Q. That was the noise caused by the crashing of the buildings, I suppose?

A. No; the first noise was more like a rumble—I really couldn't describe it hardly. When I first saw it the buildings went along kind of like that for a few feet, and then started to roll over and they

(Testimony of E. C. Guerin.)

went out of sight from where I was.

Q. Did you go down to the scene? A. Yes, sir.

Q. I suppose you moved about as fast as you could?

A. I stepped right along—I don't know how fast I traveled.

Q. Any man, seeing anything like that happen, would naturally want to get there as soon as he could. Did you see any water up there at that time, Mr. Guerin? A. Yes, sir.

Q. Whereabouts was that water,—whereabouts with reference to where the ground had slipped?

A. It was coming over the apex of the slide.

Q. Can you describe to the Court and jury where this water was coming from.

A. No, I never knew there was a flume up there, even.

Q. You don't know where the water was coming from?

A. I don't know where the water was coming from; no.

Q. You do know it was coming over the apex of the slide? A. Coming over the hill; yes.

Q. Can you give us an idea as to how much water was coming over the hill, Mr. Guerin?

A. No, I couldn't give the volume—there was quite a little stream, I know that.

Q. Was it a solid stream?

A. Well, it looked like a couple of feet wide; I couldn't state that positively. [302]

(Testimony of E. C. Guerin.)

Q. How long did you stay down there, Mr. Guerin?

A. I ran up the flight of steps in behind some buildings there, and went over into the slide, and then the people on the street—we were taking some boards out of the bottom and trying to help the people that were in the wreckage, and some people yelled another slide was coming and we jumped up on the buildings, into the alleyway and down on to the street—that's all I know about it.

Q. By that time the fire department had arrived?

A. I suppose they had.

Q. Were you one of the first upon the scene?

A. Yes; there were probably three or four men there when I got there—I don't know how many—I didn't count them.

Q. Was there anyone with you at that time, Mr. Guerin?

A. Yes; Sam Simonson was with me—he was going to Sitka with me.

Q. He was under you? A. Yes.

Q. Is that the Sam Simonson that was testifying here yesterday afternoon?

A. I don't know whether he testified here or not.

Q. Yes, he testified yesterday. Can you give us an idea, Mr. Guerin, about how long this water continued to run, or did you go away from there?

A. I didn't stay there—I don't know how long it did run—quite a little while, though.

Mr. RODEN.—That is all.

(Testimony of E. C. Guerin.)

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You saw that stream of water, Mr. Guerin, some time after you got to the slide?

A. I saw it at the time, as I remember it, Mr. Hellenthal.

Q. And your recollection now is that it was pretty soon after you got there that you saw it?

A. As I went up the hill I noticed it, and it continued maybe an hour, coming down all the time.
[303]

Q. The stream as it came over the bank was quite a stream of clear water?

A. Yes, I guess it was a couple of feet wide. I paid very little attention to it. I went in there to give some help if I could.

Q. That was the principal thing you were after?

A. Yes.

Q. To do something, and you were not particularly looking for water?

A. No; I wasn't looking for trouble, in other words.

Q. And you are now testifying as to the way it looks to you now of what happened at that time?

A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) You are testifying the way it looked at that time?

A. The way I remember the situation at that time.

Q. (By Mr. HELLENTHAL.) The water was coming in one stream, wasn't it?

(Testimony of E. C Guerin.)

A. Well, I should say over the top it was that wide, I guess; I couldn't say exactly how wide.

Q. (By Mr. HELLENTHAL.) You couldn't say how wide it was, but it was in one stream, I say?

A. As I remember it, yes, where it came over the top there.

Q. (By Mr. HELLENTHAL.) And you saw no other streams?

A. I really wasn't paying any attention—I just saw the water coming over the apex of the slide.

Q. (By Mr. HELLENTHAL.) At the apex it was all coming in one stream—there were not a number of streams, but just one solid stream?

A. One stream is all I noticed.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

(Whereupon court adjourned until 2 o'clock P. M.) [304]

AFTERNOON SESSION.

March 25, 1921, 2 P. M.

Testimony of W. J. Manahan, for Plaintiff.

W. J. MANAHAN, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. State your name, please.

A. Walter J. Manahan.

Q. What is your business?

(Testimony of W. J. Manahan.)

A. Transportation clerk.

Q. How long have you been in the town of Juneau? A. About 5 years.

Q. On the 2d day of January, 1920, that is the day on which this slide occurred, where were you, in the morning?

A. In the Pacific Steamship Company's office.

Q. Were you in the office of the Pacific Steamship Company at the time of the slide? A. Yes.

Q. What, if anything, drew your attention to the occurrence, Mr. Manahan?

A. The crashing of timbers.

Q. What did you do then?

A. I didn't do anything for a minute—I was quite surprised, but when I kind of composed myself a bit I looked out of the window from my desk.

Q. And you looked over in the direction of where the slide had occurred? A. Yes, sir.

Q. Did you see anything there in the way of water, Mr. Manahan?

A. I saw water coming down this hillside there—water, mud, gravel, and so forth.

Q. Was it coming down over this area where the slide had happened? [305]

A. This way, on the lower side of where the upper walk or road had been.

Q. That is down below what we call—

Mr. HELLENTHAL.—I object to this leading.

Mr. RODEN.—I was trying to get the name of the place.

Q. What upper walk do you mean, Mr. Manahan?

(Testimony of W. J. Manahan.)

A. Meaning that roadway known as Gastineau Avenue.

Q. That is where you saw the stuff moving down in— A. Below that.

Q. And you saw mud and water and debris and rocks, and so forth? A. Yes, sir.

Q. Did you go down to the scene of the slide yourself, Mr. Manahan?

The COURT.—Counsel objects to your leading.

Mr. RODEN.—I am just asking now if he went down there to the place and looked at it.

The COURT.—Try not to lead.

Q. Did you go down there, Mr. Manahan?

A. I went over there later on—probably 15 or 20 minutes after it had occurred.

Q. Did you see any water coming down there then?

The COURT.—You are continuing to lead him.

Q. What did you see then? Tell us what you saw.

A. I saw a lot of timbers, people running around, possibly some water—I don't exactly remember—I couldn't recall exactly what I saw—possibly like everyone else I was excited and couldn't tell you exactly, but there was considerable rock and mud and so forth sliding around there.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. The water that you saw, Mr. Manahan, was down below the upper walk? A. Yes, sir.

(Testimony of W. J. Manahan.)

Q. At the lower end? [306] A. Yes, sir.

Q. And you didn't see any water up at the top of the slide—the apex of the slide, at that time?

A. Not at that time because I couldn't see that from inside of the office—I couldn't see the top.

Q. You didn't see that until you got down to the place 15 minutes or so later?

A. Until I got out of the office—I could see it from the platform there.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [307]

Testimony of James Larson, for Plaintiff.

JAMES LARSON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. James Larson.

Q. What is your business? A. Carpenter.

Q. How long have you been around the town of Juneau? A. About 8 years.

Q. Are you acquainted with the flume and penstock that is maintained by the Alaska Juneau Company in the town of Juneau, on the hillside?

A. Yes, sir.

Q. Did you have anything to do with the installation of that penstock? A. I was working on that.

Q. Do you remember when that was?

(Testimony of James Larson.)

A. No, I couldn't exactly give you the year and the date.

Q. Were you in the town of Juneau at the time of the slide? A. Yes, sir.

Q. Where were you?

A. I was working for the Pacific Coast dock, down here, moving the coal-bunkers.

Q. What, if anything, drew your attention to the slide?

A. My partner and I, Jack Graham, we were working, and I heard the fire-bell, and I says to my partner, "There must be a fire some place; I am going up to the hopper and see"; and when I came out there I saw the whole slide had occurred and saw the water and the whole thing coming down.

Q. Where did you see this?

A. Up at the hopper.

Q. That is the coal-hopper?

A. Yes, sir. [308]

Q. Just describe as clearly as you can what you saw when you looked over towards the slide.

A. The first thing I noticed was the slide, then I saw the water coming from the hill over it, and then the next thing, as soon as I saw it, I started running down for the slide.

Q. Where was this water coming from that you saw coming over the top of the slide?

A. From the top of the hill.

Q. Whereabouts with reference to the location of the penstock?

A. From what I could see it was coming out of

(Testimony of James Larson.)

the end of the penstock and going over the hill.

Q. And then after you saw that you say you went down to the place yourself? A. Yes, sir.

Q. Did you see any water coming down there then? A. Yes, sir.

Q. Where was that water coming from?

A. From the top of the hill.

Q. Was that coming from the same place the water came from before? A. Yes, sir.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. The first you saw of it, you were working down below where you couldn't see it when you heard the fire-bell; is that right? A. Yes, sir.

Q. And after you heard the fire-bell you went up to see what had happened?

A. I went up to the hopper.

Q. And from there you could look over?

A. Yes, sir.

Q. Is that the same place Mr. Sutton was working? A. No, sir.

Q. He wasn't right at that place. Now, when you got up on top [309] of the hopper,—

A. I beg your pardon—Mr. Sutton was working on the next dock from there.

Q. He was working near there but not at the same place? A. Not at the same place.

Q. When you looked over there you saw water coming from the penstock, I believe you said?

(Testimony of James Larson.)

A. Yes, sir.

Q. The water you saw coming from the penstock dropped on the ground and ran down the hill, but at the time you didn't notice where that water finally ran out, when you were in the hopper—you couldn't see that from there?

A. I could see it coming over the high place on the hill and going right over the slide there.

Q. You could see where it came from the top down, but you couldn't trace that water down to the foot of the slide, could you—when you were in the hopper, I mean? A. Yes, sir.

Q. What could you see there?

A. I could see the water coming over and following where the slide had gone.

Q. Now, when you got to the slide did it look any different than it did when you were down in the hopper? A. No, sir.

Q. When you got to the slide that was maybe 10 minutes later, wasn't it? A. No, sir.

Q. How much later?

A. It couldn't be over three minutes.

Q. Do you mean to tell me that you can hear a fire-bell, climb up in that hopper and get down to the slide in three minutes?

A. No, I don't mean that. The minute I am down there I started running across the Pacific Coast dock and run over there, and it wouldn't take any human being over 3 minutes. [310]

Q. How long were you on top of the hopper?

(Testimony of James Larson.)

A. Just one second—took one glance and went down.

Q. All that you have testified to of what you saw from the hopper you saw in just a glance, is that right—just a glance?

A. Only just a quick glance at that time, and then run.

Q. Just a quick glance, then you jumped and ran for the slide; is that right?

A. Yes, sir, that is right.

Q. And then you got to the slide, and you have testified to what you saw after you got there?

A. Yes.

Q. How long did you stay at the slide?

A. I was working the whole day from the time I got over there.

Q. After you got to the slide and had been there a little while, wasn't there a big stream of water coming over the top of the place where the slide had broken loose?

A. Yes, right on top of the place where the,—

Q. How big a stream was that?

A. I couldn't say—it was quite a big stream.

Q. Quite a big stream of clear water running over there like a little waterfall? A. Yes.

Q. That was the situation, wasn't it? A. Yes.

Q. That was a little while after you got there?

A. Yes, sir.

Q. That stream wasn't there when you first got there, was it, or did you notice? A. Yes, sir.

(Testimony of James Larson.)

Q. That stream was there when you first got there?

A. That stream was there when I first got there, yes, sir.

Q. If this picture was taken on the morning of the slide,—look at that little building where the slide was, that must have been taken then, you think, before you got there, wasn't it? [311]

A. No, that don't look like it at that time because when I was looking there was a big stream coming down over there.

Q. That big stream doesn't show on that picture, does it? A. No.

Q. That must have been taken, then, before you got there, if it was taken at that time at all?

A. If it was taken at that time,—that is what I don't know, when it was taken.

Q. Because the stream you saw was quite a big stream and was running right over that hill?

A. Yes.

Q. And it was a stream a couple of feet wide, wasn't it? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [312]

Testimony of Harry Douglass, for Plaintiff.

HARRY DOUGLASS, sworn as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Testimony of Harry Douglass.)

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Harry Douglass.

Q. What is your business?

A. Fishing and mining.

Q. Were you in the town of Juneau on the 2d day of January, 1920, at the time of the slide?

A. Yes, sir.

Q. What were you doing on that day?

A. Well, I wasn't doing much of anything, but I happened to be down to the P. C. dock at the time.

Q. You were on the P. C. dock at the time of the slide? A. Yes, sir, I was.

Q. Did you look in the direction of the slide?

A. I did.

Q. What did you see there?

A. A man called my attention to it first, and he said, "Look at the water coming from the hill."

Q. Where was this water coming down the hill.

A. It was coming out a little bunch of timber right opposite the flume—through a clump of trees.

Q. When was that with reference to the slide that you saw that water?

A. Shortly before the slide started.

Q. Did you go down to the place where the slide happened?

A. Yes; just as soon as the first house started to move, that is the time I went to the slide.

Q. Did you see that water when you got down there? A. Yes, sir.

Mr. RODEN.—You may cross-examine. [313]

(Testimony of Harry Douglass.)

Cross-examination.

(By Mr. HELLENTHAL.)

Q. A little while before the slide you say you saw some water up on the hill running out through a clump of timbers? A. Yes, sir.

Q. That is pretty near up to the Alaska-Juneau flume?

A. That is about halfway up to the Alaska-Juneau flume.

Q. That was the first thing you saw, and then you saw the buildings move? A. Yes.

Q. That was just before you saw that water?

A. About 5 or 10 minutes, I would say.

Q. Then the buildings were moving and you went to the slide? A. Yes, sir.

Q. And it was probably 5 or 10 minutes before you got there?

A. No, sir; I was there inside of two minutes—I was there before the fire-truck got there.

Q. At that time where did you see the water?

A. I saw the water as it come down over the slide—the water was running all the way down the hill over the slide.

Q. The water was running down the hill and was running across the street? A. Yes, sir.

Q. That was a muddy mass there?

A. Yes, a muddy mass, and quite a stream of water.

Q. You didn't see where that water came from?

A. It came down the hill.

Q. You couldn't see the penstock from there,

(Testimony of Harry Douglass.)

could you? A. From the dock, yes, sir.

Q. I am not talking about the dock—at the time you were at the slide.

A. I didn't pay any attention to the penstock, but I saw the water was coming down the hill.

Q. You didn't pay any attention to where the water was coming from? [314]

A. I didn't pay any attention to where it came from—it came from the flume, that is where it came from.

Q. You saw that before the slide, didn't you?

A. Yes.

Q. But after the slide and the wreckage you didn't pay any more attention to that? A. No.

Q. And the water you saw then was the water you saw back of Issy's store?

A. No; I saw it above that.

Q. Where did you see it?

A. Up where the street runs to the Dawes' hospital.

Q. That is Gastineau Avenue? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [315]

Testimony of Frank Sonberg, for Plaintiff.

FRANK SONBERG, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Testimony of Frank Sonberg.)

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Frank Sonberg.

Q. What is your business? A. Laborer.

Q. Were you in the town of Juneau at the time of the slide? A. Yes.

Q. Where were you— where did you live at that time? A. In the Koski's house.

Q. Do you remember about what time in the morning it was that this slide occurred?

A. Some time about 11—between 11 and 12 o'clock.

Q. After 11 o'clock. Now, where were you just prior to the happening of the slide?

A. I was in the front room, I and another fellow, Andrew Waleen, and Pete Koski was coming in there and he said—

Mr. HELLENTHAL.—Don't say what Peter Koski said.

Q. (By Mr. RODEN.) We don't care what anybody said, Mr. Sonberg. You three men were in the front room, I understood you to say, you and Peter Koski and Andrew Waleen. What has become of Peter Koski?

Mr. HELLENTHAL.—It is immaterial what has become of Peter Koski.

Q. Is Peter Koski dead? A. Yes.

Q. Is Andrew Waleen dead? A. Yes.

Q. Go ahead and tell us what you did, Mr. Sonberg—not what anybody said.

A. Pete was coming in there and he said—

(Testimony of Frank Sonberg.)

Q. Don't tell what anybody said—tell what you did. [316]

A. We went behind the house looking for the water.

Q. When you went behind the house what did you see there?

A. We saw the water was coming under the sidewalk and under the house.

Q. Where was this water coming from?

A. Coming down the hill.

Q. Did you look up the hill to see how far up you could see this water?

A. It is all grass in there, and we never saw, in my estimation, 15 or 20 feet, down to the ground.

Q. Then what did you do?

A. Went down to the basement?

Q. Then?

A. We stayed there about 5 minutes—4 or 5 minutes—then we went up again.

Q. Then what happened?

A. I stepped in the front room, and Andrew Waleen went into the kitchen and he got the door open and he looked up the hill and he saw the slide coming, and he closed the door and he said, "Now," and the slide took the door and knocked him down on the floor, and then the wall came against my face, and the floor what I am standing on, the floor dropped out.

Q. What is the next thing you remember, Mr. Sonberg? A. I went down with the house.

Q. You went down with the house? A. Yes.

(Testimony of Frank Sonberg.)

Q. Did you get out of there that morning?

A. Yes.

Q. About how long after the slide did you get out?

A. Oh, I don't really know. We didn't take no attention when the house went down.

Q. You were not damaged any, were you?

A. Not very much.

Q. What material was it that was coming down against the house? [317]

A. When the house started going I didn't see the daylight more than a couple of times, for half a second, and when the house went down there was kind of a hole in the ground and the house was already caved over and I laid there in the hole.

Q. You were lying in the hole? A. Yes.

Q. About how long was it before the slide happened that you went out of there to look at that water? A. Oh, probably 8 or 10 minutes.

Mr. RODEN.—You may cross-examine.

Mr. HELLENTHAL.—No cross-examination.

(Witness excused.) [318]

Testimony of Frank Harris, for Plaintiff.

FRANK HARRIS, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. You may state your name.

(Testimony of Frank Harris.)

A. Frank Harris.

Q. Where do you live?

A. Salmon Creek road.

Q. How long have you lived in and about the town of Juneau? A. About 8 years.

Q. What line of business have you been engaged in during that time? A. Oh, various lines.

Q. Were you acquainted with the flume and penstock that were constructed by the Alaska Juneau Gold Mining Company up on the sidehill in the town of Juneau? A. To some extent I am; yes.

Q. Have you ever had occasion to go past this penstock and flume? A. Yes—several.

Q. When was that?

A. You mean traveling up and down past the—

Q. Yes, past the flume and penstock.

A. Why, for about three winters in succession.

Q. Are you acquainted with the trommel screen, as it has been called, that was installed up there?

A. Well, to some extent.

Q. You are somewhat familiar with it?

A. Yes.

Q. Have you at any time seen that trommel screen stop? A. I have.

Q. When was that, about—that is, let me put it this way—had you seen it stop within 6 or 7 months prior to the time of the slide? [319] A. Oh, yes.

Q. During that time how often would you say you have seen it stop? A. Why, I have seen it twice.

Q. Do you know what was the cause of its stopping? A. Yes, sir.

(Testimony of Frank Harris.)

Q. When you say it stopped was the motor running? A. The motor was running.

Q. And how is the motor hooked up to the trommel? A. By a belt.

Q. When you saw it stop, was the belt from the motor going over to the trommel on the pulley?

A. It was off.

Q. The motor was running?

A. The motor was running.

Q. You were up there on the day of the slide, Mr. Harris, up on the sidehill? A. Yes.

Q. Where were you at the time of the slide?

A. In the blacksmith-shop.

Q. That is right in the mine? A. Yes.

Q. When did you come out of the mine in the afternoon?

A. We came out to take a look at the slide about 3 o'clock.

Q. When you say we came out, do you remember who was with you? A. I do.

Q. What did you do in the way of looking at the slide—where did you go to?

A. Why, I stood right under the snowsheds on the hill there, that we might get a view of what had happened.

Q. Were you familiar with the trail that came down the hill—I mean this trail here—are you familiar with that trail?

A. Yes—this one coming down this way?

Q. Yes.

A. I am—and also the one this way. [320]

(Testimony of Frank Harris.)

Q. When you looked down there from the place where you were standing could you see any indications of where water had run?

A. Not from under the snowshed.

Q. Were you where you could see it?

A. From the penstock.

Q. Did you go over to the penstock at any time?

A. I did.

Q. When?

A. Right immediately after we got out there.

Q. What did you see in the way of water action, if anything?

A. Well, do you want me to explain what I seen after I got to the penstock—is that it?

Q. Yes.

A. At the mouth of the trommel there was a place cut in the earth I should judge 18 inches or 20 inches, and perhaps 6 or 8 inches deep—I could trace that about 20 or 30 feet.

Q. In what direction? A. Down the hill.

Q. Then did you follow it any further?

A. I couldn't because it was lost in the brush.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Harris, you went by there for some three years, you say? A. Well, three winters.

Q. Going to and from your work you passed that trommel screen, going back and forth from your work? A. For three winters, yes.

(Testimony of Frank Harris.)

Q. Now, during that time you saw the trommel screen, you say, stop twice? A. Yes.

Q. Was any water spilling over the screen when it was standing still on those occasions of which you spoke when you say it stopped? [321]

A. No.

Q. There was no water coming out?

A. Not that I know of.

Q. The first time you saw it you went inside, didn't you, and saw that the belt was off?

A. The first time I seen the trommel stop, you mean?

Q. Yes. A. Yes.

Q. You saw the motor was running and the belt was off, and you put the belt on, didn't you?

A. You can hear the motor running and I see the part of the trommel that stuck out of the penstock wasn't revolving so naturally there was something wrong.

Q. And you went inside to see what it was?

A. Exactly.

Q. And when you got inside you found that the belt had kicked off, didn't you? A. Yes, sir.

Q. And you put the belt back on?

A. You bet I did.

Q. And that started the thing going all right and you didn't report it to anybody? A. No.

Q. And the second time you saw it stop what was the situation? A. The same thing exactly.

Q. You put the belt on? A. Yes, sir.

Q. And you didn't report that? A. No.

(Testimony of Frank Harris.)

Q. In both cases the water was running through the screen like a stationary screen, wasn't it, and wasn't spilling over? A. Yes, sir.

Q. That is true, isn't it? A. Yes, at that time.
[322]

Q. Now, Mr. Harris, that looks like the trommel screen spout, doesn't it?

A. Why, it might have been at one time, Mr. Hellenthal.

Q. That is the one you are talking about, isn't it? A. In this picture?

Q. Yes. A. No, sir.

Q. That isn't the one you are testifying to?

A. Not what you see.

Q. Is that the one that you saw on the day of the slide?

A. This picture don't look like it.

Q. Now, tell me whether that is the same spout you saw on the day of the slide?

A. Why, the trommel I presume is the same one.

Q. Is the spout the same?

A. For the simple reason—

Q. When you shake your head the stenographer doesn't get it—say yes or no. Your answer is that it isn't the same. You can now proceed to tell us what the reason is. A. My answer was what?

Q. Your answer is that isn't the same spout that you saw on the day of the slide—that is right, isn't it? You shook your head, and I asked you to put it in such a way that the record will get it.

A. I will answer you, Mr. Hellenthal, but I would

(Testimony of Frank Harris.)

like to explain as regard to this picture taken here, from the formation of the ground.

Q. All right.

A. It might have been taken previous, or after, I don't know.

Q. But the spout—is that the spout that you saw on that day?

A. I couldn't swear to that, Mr. Hellenthal.

Q. You don't know one way or the other?

A. Why, no.

Q. And the conditions around the penstock don't look as they did when you saw them, do they?
[323]

A. I should say not.

Q. Very different? A. I should say so.

Q. What is the difference?

A. All this debris and stuff piled up around here, I never seen this.

Q. That wasn't there at the time?

A. I should say not.

Q. That little pile of rocks wasn't there at that time? A. No, sir, not that I know of.

Q. You are sure about that, aren't you?

A. At the time I seen it?

Q. Yes. A. Why, sure I am.

Q. You are certain that on the 2d day of January when you were there that little pile of rocks wasn't there—is that right?

A. This looks like quite a pile of rocks, Mr. Hellenthal.

